No. 15,091

United States Court of Appeals

For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

JURISDICTIONAL STATEMENT.

The original complaint in this action was filed on October 15, 1951. The averments of paragraphs III, IV, VII, VIII, IX and X of the first count and the averments of paragraphs I and II of the second count are, for the purposes of this jurisdictional statement, the same as the averments of the same numbered paragraphs in the first amended complaint filed October 2, 1952.

The first count is purportedly based upon the provisions of Title 45, United States Code, § 59. The second count is purportedly based upon that portion of Title 46, United States Code, § 688, which provides, in substance, that "in case of the death of any seaman as a result of a [personal injury suffered in the course of a seaman's employment]

the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in *such* action *all* statutes of the United States conferring or regulating the right of action for death in the case of railway employees *shall* be applicable."

Title 45, United States Code, § 51, provides that every common carrier by railroad while engaging in interstate or foreign commerce, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his personal representative, for the benefit of the surviving widow, for such death resulting in whole or in part by reason of any insufficiency, due to its negligence, in its appliances. The remaining bases of possible liability are ignored because the complaint specifies "That said injuries were directly caused by reason of the negligence of said defendant *in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place to work*" (T.R. p. 6) and that as a result of said injuries, Hutchison died at some time between the 24th day of April, 1951 and the 30th day of April, 1951.

It is obvious that the words "by railroad" must be deleted from the statute and the words "by water" inserted in lieu thereof. Otherwise, § 51 of Title 45, United States Code, would not be applicable to the death of a seaman by reason of personal injury suffered upon navigable waters. This is an elementary rule of statutory construction and requires no citation of authority.

The complaint fails to state a claim showing that the pleader *is* entitled to relief or that the District Court of the United States was vested with jurisdiction of the subject matter for the following reasons:

1. There is no averment that at the time of the sustaining of personal injury by Hutchison the defendant was a common carrier by water and was engaged in interstate or foreign commerce.

2. There is no averment that at the time Hutchison suffered the injuries from which he died he was employed by a common carrier in such commerce.

The averment in paragraph IV that the steamship "Linfield Victory" was used "for transportation of freight for hire by water in interstate commerce and coastwise trade" (T.R. p. 4) is insufficient and fatally defective. The appellant could have used the vessel as a "contract carrier" or "private carrier" of freight for hire by water in interstate commerce; but such activities are not sufficient to show that the defendant was a common carrier by water, or otherwise.

In an action premised upon the provisions of the *Federal Employers' Liability Act,* a complaint does not state a cause of action unless there is an allegation that the instrumentality involved was being used in interstate commerce at the time of the happening of the accident; and that the defendant and the plaintiff were at said time, respectively, engaging in interstate commerce and employed in such commerce; and that the defendant was a common carrier. (*Shade v. Northern Pacific Ry. Co.* (D.C. Wash.), 206 Fed. 353; *Hogarty v. Philadelphia, etc. Ry. Co.,* 99 A. 741, 255 Pa. St. 236; *Wrenn v. Seaboard Air Line Ry. Co.,* 86 S.E. 964, 170 N.C. 128, 36 S. Ct. 567, 241 U.S. 290, 60 L.ed. 1006; *Harlan v. Wabash Ry. Co.,* 73 S.W. 2d 749, 335 Mo. 414; *Grand Trunk Western Ry. Co. v. Lindsay,* 34 S. Ct. 581, 233 U.S. 42, 58 L.ed. 838; *Brinkmeier v. Missouri Pac. R. Co.,* 32 S. Ct. 412, 224 U.S. 268, 56 L.ed. 758; *Farmer's Bank & Trust Co. v. Atchison, T. & S. F. Ry. Co.,* 11 F.2d 993; *Frazier v.*

Hines, 260 F. 876; *Southern Ry. Co. v. Howerdon*, 106 N.E. 369, 182 Ind. 208; *Davis v. Chicago & E. I. Ry. Co.*, 94 S.W. 2d 370, 338 Mo. 1248; *Illinois Cent. R. Co. v. Kelly*, 181 S.W. 375, 167 Ky. 745; *St. Louis, etc., R. Co. v. Hesterly*, 135 S.W. 874, 98 Ark. 240, reversed on other grounds, 33 S.Ct. 703, 228 U.S. 702, 57 L.ed. 1031; *Walton v. Southern R. Co.*, 179 F. 175; and *Genzel v. New York, Chicago & St. Louis R. Co.*, 249 Ill. App. 164.)

Therefore, the District Court of the United States was without jurisdiction to do anything excepting to dismiss the action or to enter a judgment in favor of the appellant upon the ground that there was no averment or proof of the essential requisites that the appellant be a common carrier by water, engaging in interstate or foreign commerce, and that Hutchinson suffered personal injury while he was employed "by such carrier in such commerce" and died as a result thereof. This Honorable Court was likewise without jurisdiction to do anything in respect of the appeal prosecuted by Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, as a result of the judgment entered in favor of the Pacific-Atlantic Steamship Company on October 31, 1952 (T.R. pp. 16-17) excepting to affirm the same; because the lower court was without jurisdiction to do anything excepting to enter judgment in favor of Pacific-Atlantic Steamship Company.

It is also the rule that in determining whether a complaint presents a substantial *Federal* question within the jurisdiction of a Federal Court, the allegations of the complaint and not the facts developed or the decision on the merits, control. (*Mosher v. City of Phoenix*, 53 S.Ct. 67, 287 U.S. 29, 77 L.ed. 148; *Filhiol v. Torney*, 24 S.Ct. 698, 194 U.S. 356, 48 L.ed. 1014; *Moore v. Chesapeake & O. R. Co.*, 54 S.Ct. 402, 291 U.S. 205, 78 L.ed. 755;

Chaskin v. Thompson, 143 F.2d 566; *Connolly v. First National Bank—Detroit,* 86 F.2d 683, cert. den., 57 S.Ct. 795, 301 U.S. 692, 81 L.ed. 1348; *McNutt v. General Motors Acc. Corp.,* 57 S.Ct. 780, 298 U.S. 178, 80 L.ed. 1135; *Atlantic Coast Line R. Co. v. Reaves,* 208 F. 141, 125 C.C.A. 590; *Troxell v. Delaware, L. & W. R. Co.,* 183 F. 373, cert. den., 31 S.Ct. 469, 219 U.S. 584, 55 L.ed. 346; *Clark v. Southern Pac. Co.,* 175 F. 122.)

After the rendition of the verdict of the jury in favor of appellant in respect of the "first cause of action" on the last trial (T.R. pp. 82-83) judgment was docketed "in favor of the defendant as to the first cause of action and against the plaintiff" on October 18, 1955. Whether the trial court was vested with jurisdiction of the subject matter was a question of law. The rendition and docketing of the judgment in favor of the defendant as to the first cause of action is supported, as a matter of law, and is the *only* judgment which *could* have been rendered, because of the absence of any averment in respect of the matters and things hereinabove set forth, or of any evidence showing or from which it could be found that the Pacific-Atlantic Steamship Company used the steamship "Linfield Victory" for transportation of freight for hire by water in interstate commerce and coastwise trade or that the injuries were suffered by Hutchison at a time when appellant was a common carrier by water or was engaging in interstate or foreign commerce or that Hutchison suffered the injuries from which he died while he was employed by the appellant in such interstate or foreign commerce.

The complaint is also defective, in so far as jurisdictional requisites are concerned in that there is a failure to aver that Hutchison was a member of the crew of the steamship "Linfield Victory" on April 24, 1951. (*Norton v. Warner Co.,* 64 S.Ct. 747, 321 U.S. 565, 88 L.ed. 931;

South Chicago Coal & Dock Co. v. Bassett, 60 S.Ct. 544, 309 U.S. 251, 84 L.ed. 732; *DeMartino v. Bethlehem Steel Co.,* 164 F.2d 177; *Bowen v. Shamrock Towing Co.,* 139 F.2d 674; *Hawn v. American S.S. Co.,* 107 F.2d 999; *Carumbo v. Cape Cod S.S. Co.,* 123 F.2d 991; *McKie v. Diamond Marine Co.,* 204 F.2d 132; *Wilkes v. Mississippi River Sand & Gravel Co.,* 204 F.2d 383; and *Gahagan Const. Corp. v. Armao,* 165 F.2d 301.)

The judgment entered in favor of appellant on October 31, 1952 is, therefore, res judicata for the reason that this Honorable Court was without jurisdiction to reverse said judgment because the District Court of the United States was without jurisdiction to do anything excepting to enter and docket said judgment in favor of defendant-appellant. The last judgment entered in favor of defendant-appellant on the "first cause of action" is res judicata in respect of the element of a lack of jurisdiction of the subject matter. No appeal has been taken by Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, with respect to the judgment entered in favor of defendant-appellant on the "first cause of action". Said judgment was filed, entered and docketed October 18, 1955. (T.R. pp. 85-86.)

Therefore this Honorable Court, while vested with appellate jurisdiction pursuant to Title 28, United States Code, § 1291, should reverse the judgment and remand the case to the District Court of the United States with directions to dismiss the same because of the lack of jurisdiction in respect of the subject matter.

II.

STATEMENT OF THE CASE.

The evidence, including that which was admitted over objection of appellant, is set forth, mainly in narrative form, as follows:

The steamship "Linfield Victory" was owned by the United States of America, Department of Commerce, Maritime Administration, in 1951. It was bare-boat chartered to Pacific-Atlantic Steamship Company, including the period of the month of April, 1951. It was in the course of an intercoastal voyage when it was in Baltimore, Maryland, in the month of April, 1951. (R.T. p. 477; T.R. p. 310.)

Defendant's Exhibit "B" is the bare-boat charter pursuant to which defendant-appellant was in possession of the steamship "Linfield Victory" during the month of April, 1951. (R.T. p. 347; T.R. p. 281.) Clauses 1 and 11, respectively, part II, of the charter provide as follows: "*Condition of the Vessels on Delivery.* The vessel on her delivery shall be in *Class A-1 American Bureau of Shipping* or equivalent, with all required certificates, including but not limited to marine inspection certificates of the Coast Guard, Treasury Department, *and so far as due diligence can make her so*, tight, staunch, strong and well and *sufficiently tackled, appareled, furnished and equipped*, and in *every* respect *seaworthy* and in good running condition and repair, with clean swept holds and *in all respects fit for service. Structural Changes.* The Charterer shall make *no structural changes* in the Vessel and shall make *no changes in the* machinery, boilers, *appurtenances* or spare parts thereof *without in each instance first securing the written approval of the Owner.*"

Pacific-Atlantic Steamship Company had "operated" 36 or 37 Victory type vessels besides six purchased outright. Five or six of the 36 or 37 were operated under bare-boat charter; and the others were operated by Pacific-Atlantic Steamship Company for the government under a general agency agreement. (R.T. pp. 482-483; T.R. pp. 314-315.)

In the course of the inspections made by Coast Guard inspectors they go into all cargo spaces and masthouses. (R.T. pp. 483-484; T.R. pp. 315-316.)

With reference to the Victory ships other than the "Linfield Victory", that were owned by defendant-appellant or which it had operated under bare-boat charters or as general agent for the United States of America, each and every one of those ships was inspected and a regular certificate of inspection issued for each one of them by the Coast Guard. They were inspected at times throughout the United States. There would be many different inspectors who inspected and passed these vessels. Wherever the certificate expires, the first American port, the vessel has to be inspected. (R.T. pp. 496-497; T.R. p. 326.)

As a part of the Coast Guard rules and regulations there is a yearly inspection, conducted by the Coast Guard, of steam cargo vessels. According to those regulations no steam vessel may be navigated or used as a cargo vessel on navigable waters of the United States without a certificate of inspection having been issued by the Coast Guard. Those certificates of inspection are standard. (R.T. p. 217; T.R. p. 236.)

Defendant's Exhibit "A" has reference to the "Linfield Victory", owned by the United States of America, Department of Commerce, and is a photostat of the standard certificate of inspection issued by the Coast Guard. The expiration date, July 17, 1951, means it was issued about a year before that. It is what is called a regular certificate of inspection. (R.T. pp. 219-220; T.R. pp. 238-239.)

Title 46 U.S.C., § 363, 41 Stat. 305, 49 Stat. 2016, 64 Stat. 1277, provides that all steam vessels owned or operated by the Department of Commerce shall be subject

to all the provisions of title 52 of the Revised Statutes for the regulation of steam vessels and Acts amendatory thereof or supplemental thereto.

Title 46 U.S.C., § 391, 60 Stat. 1097, provides that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each steam vessel and shall satisfy itself that the vessel is in a condition to warrant a belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law are faithfully complied with.

Title 46 U.S.C., § 399, 60 Stat. 1097, provides that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, and that no vessel required to be inspected shall be navigated wthout having on board an unexpired regular certificate of inspection.

The intercoastal shipping articles are Defendant's Exhibit "C". (R.T. p. 507; T.R. p. 332.) Hutchison did not execute these intercoastal shipping articles.

When seamen are not on articles they can quit any time they want to. On an intercoastal voyage a man wouldn't be put on articles until prior to sailing from Philadelphia, Pennsylvania, for the canal, for the reason that if he was an unsatisfactory employee defendant-appellant could get rid of him without any trouble and if he did not like it he could quit at any time. In the meantime, until one side or other became dissatisfied, he would work. (R.T. pp. 492-495; T.R. pp. 324-325.)

Defendant's Exhibits "D" and "E" are, respectively, a requisition, inter alia, for four additional portable cargo lights and a receipt showing the delivery of said portable cargo lights to the vessel before the commencement of

the voyage, so that there were 26 on board. (R.T. pp. 481-482; T.R. pp. 313-314.) The object which appears in the lower right-hand corner of the space just inside the open locker door, Plaintiff's Exhibit 4, a photograph, is a portable cargo light. The object immediately below the arrow, identified as "E.O." on Plaintiff's Exhibit 7, a photograph, is an outlet for an electric current for plugging in such lights. In the event it is dark any place in a hold or in a masthouse a cargo light can be used for the purpose of supplying artificial illumination; and that is their purpose. It is the right of any member of the crew to take such a light and use it in case he desired to do so. Defendant-appellant had no restrictions on the use of these lights by the crew. (R.T. pp. 479-480; T.R. pp. 312-313.) On April 24, 1951, there was no *permanent* electrical installation of any kind *inside* the port compartment of masthouse No. 2. (R.T. pp. 331-333; T.R. pp. 268-270.)

Plaintiff's Exhibits 1 to 11, inclusive, are photographs taken in Portland, Oregon, on May 10, 1952. (R.T. pp. 130-131; T.R. pp. 168-169.) The photographer who took these photographs for plaintiff-appellee, in the presence of George E. Wise, Esq., one of her attorneys, had a camera, a bright light and his own equipment. When he took Plaintiff's Exhibit No. 3, the photographer had his floodlight run on a ladder, which was inside of the masthouse. When the photographer took Plaintiff's Exhibit 1, which shows Mr. Wise standing on the ladder in the access shaft, he used the same floodlight. (R.T. pp. 131-133; T.R. pp. 168-171.)

Although May 10, 1952 was "a clear day" it is obvious from an inspection of Plaintiff's Exhibits 7, 8 and 11 that the sun was *not* shining because of the utter absence of *any* shadows. If the sun was shining, shadows would

have been cast by the booms, ropes, chains, masthouse and ventilator cowls, etc.

This photographic evidence shows that at the time the pictures were taken hatch No. 2 and hatch No. 3 were completely closed and covered with tarpaulins so that no natural light could have gotten into the access shaft through the door leading from the shelter deck or any other deck below the main deck of the vessel, or through the screen at the bottom of the ventilator shaft. The importance of this, with respect to the degree of light then existing, will be demonstrated later in the testimony of plaintiff-appellee's witness Amundsen who stated that on April 24, 1951, he *saw* N. P. Hutchison *go into the access shaft* through a door leading thereto from a lower deck and *saw him walk up the access shaft ladder.*

These photographs show a ventilator cowl located on the top of the port compartment of the masthouse referred to in the testimony; and that the upper opening of the ventilator cowl is in the vertical plane and is equipped with a mesh screen.

Plaintiff's Exhibit No. 6, a photograph, shows a screen in the horizontal plane located in the roof of the port compartment of masthouse No. 2, *overhead* of the *ventilator shaft.* (R.T. p. 168; T.R. p. 196.)

The upper outside opening of the cowl ventilator is about 72 inches in diameter; and the lower opening, which is at the roof of the masthouse, is approximately 36 inches in diameter. The screen on the outer opening of the ventilator cowl is shown in Plaintiff's Exhibits 7 and 8. There is another screen at the butt or lower end of the ventilator shaft (cowl), as it meets the roof of the masthouse. That is the screen shown in Plaintiff's Exhibit 6. The inside of this ventilator cowl is hollow, it looks like a tube; so that there is *no obstruction to air*

or anything else, (e.g. light), excepting the two screens. (R.T. pp. 221-222; T.R. pp. 240-241.)

Plaintiff's Exhibit No. 5 (R.T. p. 109; T.R. p. 161), is a photograph taken from a considerable distance aft of masthouse No. 2. It shows that the starboard half of the masthouse has only one compartment but that there are two compartments in the port half thereof, with a door to each. Just to the center of the aft bulkhead the electrical outlet, hereinabove referred to and designated as "E.O." can be seen. No electric cord is plugged into this outlet, and there is no electric cord leading through the door to the starboard compartment. Nevertheless, the camera picked up, from this considerable distance, a portion of a life-ring and the photograph shows part of the printing on this ring consisting of the following: "TLAND—ORE". The home port of the vessel was Portland, Oregon. The door leading into the port compartment of masthouse No. 2 is the last one on the left. In the background, even from a considerable distance, the camera picked up a vertical structural member located at the extreme forward end of the inside of said compartment.

Plaintiff's Exhibits 9 and 10, respectively (R.T. p. 112; T.R. p. 164), show that the ventilator shaft is not as deep as the access shaft. The photograph (Plaintiff's Exhibit 9) looking down the access shaft shows a platform evidently at the same level as the shelter deck level and a rectangular opening in the starboard side of the shaft which is apparently the doorway from the shaft to one of the lower deck levels in a hold; and that the ladder proceeds down, through a hole in this plate, to lower deck levels.

The photographs of the inside of the port compartment of masthouse No. 2 show that a substantial part of the starboard section thereof consists of a deck running fore

and aft, at the same level as the main deck immediately outside.

The access *doorway* to the port compartment of masthouse No. 2 is *54 inches high and 21 inches wide.* (R.T. p. 159; T.R. p. 188.)

Appellant contends that, considering the relatively small cubic area inside the said compartment, the court should take judicial notice of the natural law of physics with respect to the luminous energy of light and hold that it was adequately illuminated by means of the natural light (on a clear, sunny day) which would as a certainty enter the masthouse if the door was open; and there is no evidence showing that the door was closed at any time on April 24, 1951 after it was opened at 8:00 a.m.

The deck (fore and aft) alongside the hatch (access shaft) shown in Plaintiff's Exhibit No. 7, is the same level as the main deck. (R.T. pp. 173-174; T.R. pp. 199-200.)

Plaintiff's Exhibit No. 12 (R.T. p. 144; T.R. p. 179) is a diagram of the inside of the port compartment of masthouse No. 2. This shows, by resorting to the scale thereon, that the upper perimeter of the pipe railing is 42½ inches above the deck level and that the lower pipe railing is at about midway between the deck level and the upper railing. This is also apparent from the photographs.

N. P. Hutchison was 66 inches in height and weighed about 165 pounds. (R.T. p. 257; T.R. p. 256.) If there is added an additional inch for shoes, the top of his head would be 67 inches above the deck level if he stood erect. Thus, in such position, approximately two-thirds of his body would be *below* the top of the top railing. The photographic evidence shows that the highest step of the access shaft ladder is approximately six inches below the

deck level. If he had one or both feet on the top step of the ladder 48½ inches of his body would be below the upper perimeter of the top railing. He was only 5½ feet tall and considerably overweight for that height at 165 pounds. Thus the center of gravity of his body would be considerably below that part thereof which would be at the level of the top pipe railing regardless of whether he was on the deck level or on the top step of the ladder.

It was stipulated, with respect to Plaintiff's Exhibits Nos. 7 and 8, that the black covering material is the tarpaulin which is stretched over the top of the hatch coverings; that when the tarpaulin and the hatch covers themselves are removed, there is an opening in the deck as wide and long as the picture shows the hatch to be; and that there is a vertical steel ladder, straight up and down, attached to the inside of the aft part of the hatch coaming in hatch No. 3; the upper end of said ladder being bolted or welded to the inside of the hatch coaming below the upper portion. (R.T. pp. 177-179; T.R. pp. 203-204.)

It was also stipulated that when plaintiff's witness Kalnin referred, in his deposition, to the aft end of hatch No. 3 being uncovered, he was referring to the after portion of it, the part toward the rear end of the ship. (R.T. pp. 179-180; T.R. pp. 205-206.)

The oral testimony offered by plaintiff-appellee, with respect to the subject of liability, consisted of the depositions of the witnesses Amundsen, Kalnin, (both of whom were members of the crew and on board the ship on April 24, 1951) and Castle, son-in-law of the plaintiff, who went aboard the ship in the latter part of May, 1951, in San Francisco; testimony of John Hutchison, a brother of the deceased; the personal appearance testimony of

George E. Wise, Esq., one of plaintiff's attorneys; and Crawford, a retired master mariner and operator of a nautical school.

The substance of the testimony of these witnesses is as follows:

1. Amundsen's deposition was taken on July 18, 1952, more than a year and two months subsequent to April 24, 1951. (T.R. p. 42; T.R. p. 129.) (All of his testimony with reference to the use of a ladder refers to the ladder in the access shaft located in the after port quarter of the port compartment of masthouse No. 2.)

I have been going to sea 22 years as an A.B. I served on the "Linfield Victory" almost six months. (R.T. p. 66; T.R. p. 130.) I first met Scotty (Hutchison) at the port of Baltimore. We was working together on board the ship. He was the maintenance man but did more or less the same work as I did. "Q. Now, while you and Scotty (Hutchison) were on the ship can you recall any occasion when you were both working in the hold together? A. Well, you mean when we were down cleaning holds? Q. Yes. A. Well, we started on—well, like every day we were working together. Q. I see. A. And—well, I don't know—that special morning we were down there like any other day. The boatswain turned us to at 8:00 o'clock, and we went down there and cleaned holds, and the boatswain come and knocked us off for coffee time. Q. *Do you remember what hold it was?* A. No. (number) 2. Q. And you were down in the hold? A. Yes. Q. Was Scotty with you? A. Yes, sir. Q. From 8:00 o'clock in the morning? A. Yes." Well, then we worked, and so the boatswain come and knocked us off about 10:00 o'clock, "Come up for coffee". We came up the access ladder there on the masthouse. That access ladder was located on the port side with respect to the hold I

was working in. It (the door) was on the port side of the hold in the *after* part of No. *2* hold. When we came up for coffee time we used that access ladder. We come up the same way as we went down at 8:00 o'clock in the morning, through the access or masthouse ladder. (R.T. pp. 67-70; T.R. pp. 131-134.) We went in and had coffee and went into Scotty's forecastle. While we were in his forecastle I had an opportunity to observe his condition as to sobriety. He was sober. I was sober that morning; I didn't even go ashore. After we finished coffee the bos'n said, "Let's go"; so we went back the *same ladder we came up.* We started working again cleaning holds, sweeping and picking up papers; we were working there and Scotty said, "I'm going up on deck and get a drink". I *saw* him *walk up;* I *saw* him go *out the door* and *walk up the ladder,* and so we worked there. We went up for lunch. That was about *around* eleven. The bos'n came in and knocked us off, so we went up on deck the *same* way. We walk up the same, *up and down all morning.* I went back down in the hold to work after dinner. Scotty was not with me. The last time I saw Scotty was *around* 11:00 o'clock, *or something like that.* When he came back down into the hold with me after coffee time, that was at 10:30. It was some time later, but before lunch, that Scotty went back up. The route he took was the same way, through the door; and that is the last time I saw him. I may have next seen him up in the dining room, I'm not sure. The next time I saw him he was at the bottom of the ventilator shaft up in Philadelphia about five days later. The ladder shown in Plaintiff's Exhibit No. 1 is the ladder we were talking about. (R.T. pp. 70-75; T.R. pp. 134-138.) Masthouse No. 2 looked like Plaintiff's Exhibit No. 2. That (Plaintiff's Exhibit 2) is an accurate reproduction of the top of the ladder at masthouse No. 2. (R.T. pp. 82-83; T.R. pp. 138-139.)

(Note: All testimony of Amundsen with respect to what he had seen on other ships was subject to objection upon the grounds, *inter alia,* that it was irrelevant and that no proper foundation had been laid showing that what he had observed on other ships was under substantially similar conditions.)

I have been on other ships that have access ladders in the masthouse. And on other ships the bars (guard rails) go right across here (referring to the starboard edge of the access shaft). (R.T. pp. 84-85; T.R. pp. 139-140.) There was no ladder in the ventilator shaft. (R.T. p. 87; T.R. p. 142.) The arrangement shown in this photograph (Plaintiff's Exhibit No. 2; R.T. p. 85; T.R. p. 140) was different from the arrangement that I have noticed on other ships I have served on. I mean the bars. The arrangement on the "Linfield Victory" was different from the arrangement that I am familiar with on other ships in that other ships got screens down here, and stuff like that, over the ventilator opening. I have never seen on other ships, in masthouses, a ventilator opening without a ladder going down it. This is the first time I ever seen it. (R.T. pp. 84-89; T.R. pp. 139-145.) On the ships I have been on the bars go all the way across, in the manner I have drawn them here. I had to climb over them. (The photograph, Plaintiff's Exhibit 2, and other testimony of Amundsen demonstrate that he was not at this point talking about bars going across the ventilator shaft but only with respect to the access shaft containing the ladder.) (R.T. pp. 87-89; T.R. pp. 142-143.) I don't remember whether there were any artificial lights. (R.T. p. 88; T.R. p. 143.) When I last saw Hutchison he appeared to be fine as to sobriety and in good spirits. (R.T. p. 89; T.R. p. 144.) At 8:00 o'clock in the morning the hold was not open; all of it was covered. I went down through what was called the escape hatch which goes

through the masthouse. In the morning when I went down there to work in the No. *2* hold about *four or five men* went down *this* escape hatch. We went through the door on the port side of No. 2 masthouse. I *opened* the door. When I opened the door I *saw* a *stanchion and two sets of pipe rails* there as indicated on this picture Plaintiff's Exhibit 2. Those two pipe rails and the stanchion were all there at the time when I first went down there in the morning. Those are not movable. They are welded right to the side of the vessel or the bulkhead. The stanchion is welded in place. The stanchion is over three feet in height. I don't recall the order in which we went down. Hutchison and a couple of other ordinaries or A.B.'s and I went down that ladder. I got down to the *bottom* hold and opened the door and came into the *No. 2* hold of the vessel. After that all of us, including Hutchison, came up for coffee at 10:00 o'clock and made it up all right. Then I went and had a smoke in Hutchison's quarters. Then the boatswain turned us to again and the *same* gang went back down this *same* ladder. Those rails that I have marked on Plaintiff's Exhibit 2 were present at that time. *We went down without any incident; nothing happened on the way down.* We started to work again down there. Then, *about* 11:00 o'clock, *something like that,* Hutchison said he was going to the lavatory to get a drink. I saw him go through the door in the hold that leads to this escape hatch. That is the last I saw him. He did not come back. I am not sure if I saw him at lunchtime. *I came up this escape hatch* for lunch *about 11:30 or 25 minutes to 12:00.* I am not sure if I saw Hutchison for lunch. I wouldn't swear to that. It could be possible that I may have seen him for lunch. We turned to again and all went down again, except Hutchison, at 1:00 o'clock. I said I wondered where Scotty was.

I had no conversation with anyone concerning him at that time. All I did was make a remark, "I wonder where Scotty is." I don't recall any remarks being made by any of the members of the gang down there. (R.T. pp. 89-99; T.R. pp. 144-154.) In these particular escape hatches there are sometimes rails which I have designated as "A.A." in this picture, the same as this; those bars go right across. These lines I have drawn indicating bars would bar entrance to the *escape ladder*. We had to climb over on other ships. I do not know exactly when Scotty was found. It was four or five days after the day I last saw him. I went and took a look down here (referring to the ventilator shaft) where they found him. That ventilator shaft brings up air or allows cold air to get down in the hold. There is a ventilator up on top of the masthouse. I have never seen any cover over the opening of the ventilator shaft on that ship. I have never been on vessels where there is a lack or absence of these particular rails guarding the ventilator shaft. There are always bars guarding the ventilator shaft just like there are in this particular picture here, Plaintiff's Exhibit 2. They are all about the same height; that is, a stanchion. There is a screen at the bottom of the ventilator shaft that allows the air to come up or go down in the hold. (R.T. pp. 100-103; T.R. pp. 154-157.)

It was stipulated that the lines which Amundsen put on the photograph, Plaintiff's Exhibit No. 2, to indicate the presence of bars on other vessels or some other vessel that he had worked on are the lines from the stanchion over to the bulkhead, identified as "A.A." and the one directly below it also going to the bulkhead and identified as "A.A." and that the other lines merely indicate the rails the witness was talking about that were surrounding the ventilator shaft. (R.T. pp. 106-107; T.R. pp. 158-160.)

It was also stipulated that all of the photographs, Plaintiff's Exhibits 1 to 11, were taken at the same time up in Portland, Oregon; and that only one door goes into the part of the masthouse through which the men went in order to go to work by going down the escape hatch, the shaft with a ladder. (R.T. p. 109; T.R. p. 161.)

It was stipulated that Plaintiff's Exhibit 4 is the gear locker referred to in the Amundsen deposition located on the starboard side and that *whatever* is shown in there and other things described in the deposition were customarily stored in *that* locker; and that Plaintiff's Exhibit 6 is the overhead screen referred to in Kalnin's deposition. It was also stipulated that Plaintiff's Exhibit No. 9 shows the escape hatch referred to in the Amundsen deposition going down to the hold where the men had been working and the ladder he testified they had used; and that escape shaft ladder is the same one on which Mr. George Wise is standing on part of the escape hatch ladder in Plaintiff's Exhibit No. 1; and that Plaintiff's Exhibit 10 is the ventilator shaft which has been testified to in the Amundsen deposition, looking down to the screen, where Amundsen testified the body of Hutchison was found; and that Plaintiff's Exhibit No. 11 is a picture showing as much of the "Linfield Victory" as you can get in a side view. (R.T. pp. 109-113; T.R. pp. 162-164.)

It was stipulated that Plaintiff's Exhibit 7 shows hatches No. 2 and No. 3 completely covered; and that the particular device that looks like an old-fashioned brass horn, a big one, is the ventilator up on top of the masthouse that Amundsen referred to on both the port and the starboard side; and that there are only three doors in the No. 2 masthouse, one on the starboard side and two on the port side. (R.T. pp. 111-112; T.R. pp. 162-163.)

2. The deposition of Kalnin was taken on May 17, 1952. (TR. p. 113; T.R. p. 164.)

My occupation is seaman, winchman, bos'n and has been for, roughly, twenty years. I have been on practically every type ship made during this time, passenger ships down to schooners. I have had occasion to be on several Victory ships. One was the "Linfield Victory". I was on it on April 24, 1951, as sailing bos'n. I knew Hutchison. He shipped in New York as an able-bodied seaman, maintenance. On April 24, 1951, we were in Baltimore cleaning holds, No. *3* hold; helped pick up the dirt and sweep up the hatch for the new cargo. There was Hutchison, four other sailors and myself down in *that* hold. I told them what to do and laid out the work. (R.T. pp. 114-116; T.R. pp. 165-167.) That was about 8:00 o'clock in the morning and we turned to in *No. 3* hatch. The first thing we did there was open the aft section of No. 3 hatch. There is a ladder there and there is also a ladder in the midship house. You can use either way to go down that hold. We worked until 10:00 o'clock, stopped and went for coffee, and at 10:15 went back in to clean up again, finish the job; and worked until dinner; knocked off about ten to twelve. I observed Hutchison working in *this* hold (No. 3) until dinner time. He left to go up at dinner time, about ten minutes to twelve, the same as the rest of the gang. I saw him once more after that, coming from the messroom. The next time I observed him it was in Philadelphia when we found him, before arrival in Philadelphia, on April 30, about six days later. I observed Hutchison in the No. 3 masthead. He looked to me like he was dead. He was down there. He was missed, but I figured he went ashore, as guys do when they want a day off or so, they just go ashore. Neither I nor any other person *observed* by me made a

search; the only place *we* searched for him was in the forecastle and in the messroom; and when *we* didn't find him in there, *we just told the mate to hire another sailor,* and we did, thinking he was left behind. I had been on the "Linfield Victory" about four months anyway. (R.T. pp. 159-163; T.R. pp. 188-193.) Plaintiff's Exhibit No. 8 (a photograph) is the entrance to the ventilator shaft, where the railing is. You can easily see the stairway leading down to the hatches, down to No. 3 hatches. This is the ladder on the left and the ventilator on the right. (Plaintiff's Exhibit No. 2.) The ventilator is approximately 20 feet deep. Plaintiff's Exhibit No. 6 is a screen *overhead* of the ventilator. I was Hutchison's superior or gave him orders. Roughly, he would make average wages about $270.00 a month plus anywhere *from* $80.00 *to* $100.00 a month overtime, which was an *average.* (R.T. pp. 164-169; T.R. pp. 193-198.) I signed on as a member of the crew in San Francisco. Hutchison got on the ship in New York. I didn't see him sign any articles. This deck alongside the hatch (access shaft) shown in Plaintiff's Exhibit No. 7 is the main deck. The masthouse I have been referring to is on the port side of the ship. The masthouse doors are watertight. The door over on the right-hand side of the mast is the gear locker; keep your extra wires and slings and stuff like that in there. The hold that the men were cleaning out on the morning I have referred to was the shelter deck, the first deck down from the main deck. The next deck below that is called the lower hold. Roughly, all of us got down there at about the same time from the main deck but it only takes one man at a time on the ladder. Some went down through the masthouse and some went down through the aft part of the No. 3 (hatch). I didn't go down. I could see everything from the deck. I was standing at the winches. I saw Hutchison go down in the morning. He

didn't go down through the masthouse in the morning but he came up that way at noontime. He came up through this ladder in the masthouse. In the morning I saw him go down. I was standing right there. There is a ladder which goes from the forward hatch coaming of hatch No. 3 down to the level of the shelter deck and there is also another ladder at the aft coaming of hatch No. 3 which goes down to the shelter deck. Both of these ladders are vertical ladders exactly like the ladder which is shown in Plaintiff's Exhibit No. 9. Some of the men who were working down there with Hutchison went down the ladder in the shaft adjacent to the ventilator shaft and some went down the ladder which was right at the aft coaming of hatch No. 3; both lead to the same place. I was still on deck until they all came up. (R.T. pp. 173-177; T.R. pp. 199-204.) Hutchison came out through the masthouse and walked between the winches and one side to the messhall. I saw him come out of the masthouse. I wasn't watching him coming up the ladder. The only way he could have gotten up from the shelter deck to the main deck unless he came up on the other end, which he didn't, was to come up this ladder in the shaft adjacent to the ventilator shaft. He couldn't have come up any ladder except the one shown in Plaintiff's Exhibit 2 to come out of the masthouse door; he had to come up that ladder. When I saw him walk out of the masthouse door he walked aft, towards the messhall, along the starboard side of the ship. I did not see him in the messhall. I saw him on the companionway, coming from the messhall. Evidently he got there before I did. The messhall is the only place he could have been. I didn't see where he went after that. The other men who had been working down at the shelter deck level of hatch No. 3 went back to that part of the ship and continued working after lunch, 1:00 o'clock. We worked until three that day, fin-

ished the job. Hutchison was not down there at any time between one and three. When he didn't show up at 1:00 o'clock I took it for granted that he had gone ashore and that was the reason I didn't conduct any search for him. As a matter of fact, I had the mate call the police department to see if he might possibly be in jail. When I found out he wasn't in jail I sent for another sailor to take his place. I gave testimony at a Merchant Marine Investigating Unit of the United States Coast Guard, at Philadelphia, Pennsylvania, on May 1, 1951. At that time I stated that I saw Hutchison at dinner time, but I didn't stay long, coming out of the messroom, just had a bowl of soup, started out of the messroom. I didn't see him any more after that. The last place I saw him was in the messroom. His condition regarding sobriety was he was sober, slight hangover. On the day of the accident when I saw him I came to the conclusion that he had been drinking but that all he had was a hangover. When I woke him up in the morning he was in the bunk and there were no bottles, and he was still feeling rough, that's all. When I say "feeling rough", I mean, you know, when a guy stays up late; it is his duty to go to work and he knew it and had to turn to. When I said he had a hangover I mean he was just feeling rough; could have been out late, going around somewhere; when I said he had a hangover I didn't use that word to convey the impression that he had been drinking the night before and had some of the results of it the next day; didn't mean that he was drinking. I know he had been out late. He mentioned the fact he got in at four in the morning. He said, "I hate to work today but I have got to do it." "Q. How often did the members of the crew, to your knowledge, use the ladder which was in the shaft immediately adjacent to the masthouse ventilator shaft for the purpose of going to some deck below the level of the

main deck and for the purpose of coming up to the main deck from a level below the main deck. A. That ladder is put there for the use—for that purpose—when people are working on the winches, they don't want them to interfere with the winch drivers and get in the way and get hit." They are used *constantly,* all the time, day and night, whenever they are working. Sometimes they work at night as well as daytime. *Longshoremen* use it *all the time.* The hatch was uncovered at the aft end of hatch No. 3 all during the day that I have been talking about, heaving dirt slings out, sweepings from the hold. (It was stipulated at this point that when the witness refers to dirt slings he means a cloth or wire device in which the debris is placed, after being swept up in the hold, and then it is hooked together in some fashion and is hoisted out of the hatch by means of the winch; and then they send the empty sling down the same way, by means of the winch.) The ladder at the aft hatch coaming of hatch No. 3 was available all during that day for the purpose of either going from the main deck down to the shelter deck or from the shelter deck up to the main deck. The ladder in that hatch, meaning the ladder in the masthouse, is the one they used at all times when the hatch is open, so you don't get hit with the winches' loads. The last time I saw Hutchison he was coming from the messroom in a passageway. He was still under cover inside the midship house. I didn't see him at any time out on deck after lunch. "Mr. Gallagher. Then I said, 'He said the reason he didn't make a search was that he figured the man had just gone ashore' to which Kalnin responded: 'which happens when you are alongside a dock'." I looked in the messroom and in his room and he wasn't there, and called the hospital and police stations and he wasn't there, so we ordered another sailor. When Hutchison was awakened in the morning he wanted to sleep in.

If I didn't give him a good shake he probably would sleep in, wouldn't turn to. I observed nothing in his conduct that would lead me to believe he had been drinking. With respect to the ladder located in the masthouse, going down from the main deck (to) the shelter deck, that was used frequently. (R.T. pp. 181-192; T.R. pp. 206-217.)

3. Castle's deposition was taken September 20, 1952. He is plaintiff's son-in-law. (R.T. p. 192; T.R. p. 217.)

I am a merchant marine officer and have held an unlimited master's license, in steam, any tonnage, any ocean, for nine years. (R.T. pp. 192-195; T.R. pp. 216-218.) I have served aboard nearly every type of vessel in the American merchant marine excepting the vessel in question in this case, a so-called Victory ship. I was aboard the "Linfield Victory" in San Francisco. (R.T. p. 196; T.R. p. 219.) I am familiar with the Victory ship "Linfield Victory" in the respect that I went aboard her in the latter part of May, 1951, in San Francisco. The chief officer, the same mate that was on there when the accident occurred, was aboard the vessel. We went to the No. 2 raised deckhouse. He showed me this ladder and trunk on the port side and explained how the body was found, the position in which it lay. I made an examination of the masthouse and the area surrounding it. *I went up and down the ladder several times* and *looked down the trunk* and *looked about the interior of the masthouse.* The mate and I closed the masthouse door to see just how dark it was in there. It was quite dark and this was in late forenoon. "Q. Did you note any screen or other *protective* covering surrounding the ventilating shaft? A. There was no screen over the ventilating shaft at all. It was open on the top. There was a broken screen on the bottom, the hold end of it, the lower end." "Q. By Mr. Wise: Did you have an opinion as to whether this area constituted a safe place to work? A. I have an

opinion, yes. Q. By Mr. Wise: What is that opinion? A. My opinion is that with proper illumination or with the doors wide open so that daylight could get in, it would be safe enough to work in the area mentioned, in the area of the masthouse." (R.T. pp. 196-201; T.R. pp. 220-223.)

4. John Hutchison, brother of the deceased, testified as follows:

On May 27, 1951, Mr. Simpson and I together visited the "Linfield Victory". After boarding the ship I went into the area where my brother was found. In the space that has been described as the masthouse, I *saw* the ladder, the rail, the ventilating shaft and the door. We had the masthouse door opened and saw that there were no light fixtures or evidence of any light in there. I went inside that masthouse, in the morning, before noon. It was a bright day. We opened the door to get in. We closed the door after we went in. I did not see around; no light on. I could not see my hand before my face at two feet when the door is closed. There was no window or transom or skylight in the masthouse. No light was seen coming in through the crack of the door. It was absolute darkness when the door was closed. I had to go through the door to get in so I saw inside that masthouse when the door was at least partly open. I saw into that masthouse when the door was fully open, practically when I am at right angles to the masthouse. "Q. Couldn't you see around pretty well when the door was open when you were in the masthouse? Couldn't you see around the mashouse all right? A. As soon as your eyes become accustomed to the relative darkness inside coming from the sunlight outside, it was easy to see," I mean it was like any enclosed room when you open a door and you are coming in from a bright light, you have to get accustomed to the

darker light. I was in *all* parts of the particular section of the masthouse. I saw ladders. When the door was closed I could not see them. When the door was *halfway open* I could see them; *any light would show the ladders.* I did not see any electrical conduits on the wall or ceiling of that masthouse. (R.T. pp. 350-356; T.R. pp. 283-289.)

5. George E. Wise, one of plaintiff's attorneys, testified as follows:

On May 10, 1952, Plaintiff's Exhibits 1 through 11 were taken in my presence aboard the "Linfield Victory" in Portland, Oregon. Directing my attention to Plaintiff's No. 3, it shows the door open; Mr. Ackroyd, the photographer, had his floodlight run on a ladder, which was inside of the masthouse, and he was standing on something; he took it slanting down from outside. Directing my attention to Plaintiff's No. 1, the photographer used the same floodlight for the purpose of taking that picture. At the time Exhibit 3 was taken I was standing outside of the door in the deck portion. There was a floodlight inside. I stood outside of that door before any floodlight was in there and before any artificial illumination was in there and looked inside the masthouse. This was in broad daylight. I can't tell you in terms of feet how close I was standing to the open door. I either opened the door myself or one of the other gentlemen did. When I opened the door I looked inside the masthouse. Standing outside with the door open in broad daylight, without any other kind of light inside that masthouse, I think it would be like looking into a closet with the door open. You could make out the fact there were things in there, probably make out the rough outline of these things. It would be looking from the outside light into a dark area. It is my testimony, as a fact in this case, that with the masthouse door open and standing outside on the deck in broad day-

light, I could see there were these things in there; not clearly like you can see it here (in the photograph); as I say it is like looking from the outside into a closet. You will see what is in there generally, but you won't see it clearly, as if you have a light on it. "Q. It is your testimony, Mr. Wise, that a door which is not inside of a room, now, and you are not going into a closet, you are going from broad daylight through a door which has the natural diffusion of light, you recognize that, don't you? A. Yes. Q. Is it your testimony under oath, Mr. Wise, that standing out here you were unable to see clearly these pipe railings, the stanchion and the fact there was a ladder in that escape hatch? Will you please answer that yes or no? A. I can't answer it yes or no, because I don't know what you mean by the word clearly. If it is as clear as this, no (indicating)." I think I have said I could see these items in here, but not clearly (indicating). "Q. Well, were you able to see that there were pipe railings around an opening in the deck, to wit, this ventilator shaft? A. Yes, I think you could see the pipe railings." I think I saw the pipe railings before I went in there but I am not sure just whether I did or not. My best recollection would be that, as I say, not clearly as you would see them here, but you could see them; could make them out. There was no difficulty about my eyesight telling me, before I walked in, and without any light, just from the light that came from broad daylight through this wide open door, that there were pipe railings around the ventilator shaft; I could see those. I had no difficulty in making out that there were pipe railings there. (R.T. pp. 130-137; T.R. pp. 168-174.) "Q. I am not asking you what you specifically remember. I am asking you, Mr. Wise, if you testify, as a fact, here under oath, before this jury, that standing outside the

masthouse, close up to the door, with the door wide open, you could not see that there were two shafts in that masthouse, two openings in the deck? A. Well, I don't remember looking specifically to see whether there were two openings or a ladder, or anything like that. I don't have any recollection of seeing them prior to the time we started looking for them when we went inside." (R.T. p. 138; T.R. pp. 174-175.) When I stood outside of the masthouse on the deck here, there was nothing to prevent whatever light there was from getting into the masthouse. Whatever amount of natural light in broad daylight would go through this masthouse door, when it was opened, was inside the masthouse when I stood out there and looked in. "Q. Now, I want to ask you again: Is it your positive testimony that there was not enough light in broad daylight, going through the doorway, wide open, to enable you to see two openings in the deck of that masthouse? Please answer that yes or no. A. No. Q. You could not see it? A. That is not what I said. I say it is not my positive testimony. In other words what I said was I don't recollect looking at these shafts." "Q Eliminating everything excepting the natural light, which was present there all around that masthouse on the day you were there in broad daylight with the door of that masthouse open, standing there at the door, could you, with your degree of visibility, see with just that light openings in the deck of the masthouse? Yes or no. A. I think my answer would be yes, Mr. Gallagher." (R.T. pp. 139-141; T.R. pp. 175-177.) It was about three feet from the doorway into the masthouse to the stanchion which was at the corner of the guard rails around the ventilator shaft. (R.T. p. 143; T.R. pp. 177-178.) Before I went in (the masthouse) I could see these pipe rails and that stanchion was there; generally what you see here, but not

as clearly as this (referring to photograph). I doubt that you could see a ladder here. "Q. Do you remember that you were not able to see the ladder, Mr. Wise, and is it your testimony under oath that standing outside you could not see the ladder? A. All I can say is that I don't recall seeing the ladder when I looked in." I am not testifying that I looked in the direction of the ladder and failed to see it; I am not testifying that I saw it; I mean I just don't recollect seeing it when I looked in, but I could see there was nothing on the floor and see the pipe railings. I just don't recollect having looked at that specific location before I walked in the masthouse. I just don't remember one way or the other. On the day when I was up there and these pictures were taken, the hatch was completely covered and closed over. (R.T. pp. 143-148; T.R. pp. 178-182.) I didn't bring this floodlight that shows in the locker on the starboard side of the masthouse with me and the photographer didn't bring that either. That is the one that shows in Plaintiff's Exhibit 4. That was there when the locker was opened up for me on my visit to the vessel. (R.T. pp. 153-154; T.R. pp. 187-188.)

6. Lorkan Crawford testified as follows:

I am president of Crawford Nautical Schools and Crawford Nautical Advisors, and principal of Crawford Nautical Schools. (R.T. p. 202; T.R. p. 224.) I obtained a master's license about 40 years ago. I have never had any professional experience with Victory ships. I have been aboard Victory ships and am familiar with their construction and design. (Note: All of this witness' testimony with respect to alleged customs or practices and with respect to what he had observed on ships was admitted over objection of defendant.) In the course of my experience aboard ships I have had occasion to observe

or know there was a custom with regard to accounting for men. (R.T. p. 205; T.R. p. 226.) To the best of my knowledge such a custom was in effect on April 24, 1951. That custom was to *account for the working hours* and *places of each member of the crew at all times.* There was a custom to *account* for men who were missing. To the best of my knowledge that custom was in existence on April 24, 1951. The custom was to *determine* when a man was *assigned* to any particular work *that he performed that work* so that an accounting could be kept in a logical way of his man hours. If a man were missing there was a custom for *ascertaining* his whereabouts. To the best of my knowledge that custom was in existence on April 24, 1951. The reason I qualified my answer is that I teach these men on ships, and in 1951, I was so employed and not actually on a ship. Therefore, *my knowledge of the custom necessarily would be by study and hearsay.* I tell you about the custom *as it is imparted to me from the men who execute the custom.* The custom in the case of a missing man is that his immediate superior reported to his immediate superior or executive of the particular department, deck, engineer or steward; that executive of the department then institutes a search, to determine the whereabouts of the missing man, if that is possible. *That search would necessarily include an inspection of the man's living quarters, eating quarters, and working quarters on the vessel, but should perhaps include every portion of the vessel.* In the course of my experience I have observed a custom or know of a custom with respect to the *illumination of work areas* aboard a ship, *such as a masthouse.* That custom is to thoroughly illuminate any area in which a man or men are working. Plaintiff's Exhibit No. 4 is a masthouse. This portion you are now pointing to at the upper center of Plaintiff's No. 4 is the

cowl of the ventilator. "Q. Showing you Plaintiff's No. 7, I ask you how far down does such a ventilator go. A. The cowl should end at the top of the masthouse. The ventilator shaft continues to the compartments to be ventilated. Q. Directing your attention again to Plaintiff's 4, with this open hatch door, I ask you, can you see the ventilator shaft? A. Yes. Q. Where is it? A. There (indicating). Q. It that an open ventilator shaft? A. No." These particular bars marked on Plaintiff's Exhibit No. 2 as "rails" are guard rails. In the course of my experience, I have never seen rails projecting or going across that area (identified as "AA", "AA". In the course of my experience I have seen other *protective* devices such as these guard rails around the ventilator shaft. I have seen *a* heavy screen which *excludes the danger; it would exclude a dangerous area when there was an area of access immediately close to it or in the vicinity. That screen would be located where the guard rails are now. Several hundred* of the *Victory-type vessels were built by the United States of America during the last war.* I have been aboard approximately five of them. I did not go into the masthouse on each of those five. (R.T. pp. 209-216; T.R. pp. 229-235.) The *last* time I acted in *any* capacity as a member of a crew or a licensed officer on any ocean-going vessel was about *January of 1943.* I have *not* been employed in *any* capacity aboard *any* ocean-going vessel *since January of 1943.* (R.T. pp. 218-219; T.R. p. 237.)

7. Emma Hutchison, plaintiff, testified as follows:

I am the widow of N. P. Hutchison. He and I were married November 4, 1940. He was a steel worker or iron worker on construction iron work, also worked in the oil fields, and was a seaman. He began to work as a seaman in *1943.* He worked as *able seaman, boatswain's mate* and

maintenance man on cargo ships. I last saw him about March 21, 1951. (R.T. pp. 300-302; T.R. pp. 258-259.) On April 24, 1951, my husband was 44 and I was 53. Mr. Hutchison contributed to my support. Whenever he came off a trip he would give me *around* seventy-five percent or *thereabouts* of his money; he kept the rest; and *we* decided where to *put* it and what to do with it. *We* disposed of it, *in the bank* or whatever *we* wanted to do with it, *like any other family does.* (R.T. pp. 304-306; T.R. pp. 261-262.) (*There is no testimony whatever with respect to how much of the "around" seventy-five percent "or thereabouts" take-home pay was used by or reasonably or otherwise required for Mrs. Hutchison's support and maintenance.*) *Neither Mr. Hutchison nor I* had *any* relatives or friends in *Baltimore,* Maryland. Prior to the time I married Mr. Hutchison I had been married to a man named McFee, who died. I have five living children as a result of the marriage to Mr. McFee. I have said Mr. Hutchison had been *a steel worker;* he was a *structural steel worker;* worked *not only on the ground but high up on the buildings in the course of construction.* (R.T. pp. 307-308; T.R. pp. 264-265.)

Plaintiff's Exhibit 17 (R.T. p. 304; T.R. p. 262) is the Joint Federal Income Tax Return of plaintiff and her husband for the calendar year 1950. This exhibit shows total *gross* earnings by Hutchison as $4705.96, with income tax withheld at the source in the sum of $581.65. Therefore, the total "take-home" earnings of the deceased for the entire year 1950 was the sum of $4124.31. Seventy-five percent of this "take-home" pay is the sum of $3093.23. Multiplying $3093.23 by nineteen years, the full life expectancy of plaintiff, results in the total sum of $58,771.37. (*There is no evidence showing that Mr. Hutchison was employed or earned any money whatever*

during 1951 up to the time he was employed by appellant on April 17, 1951.)

Plaintiff's Exhibit 15 (R.T. p. 300; T.R. pp. 257-258) consists of log entries from midnight, April 16, 1951, to midnight, April 30, 1951. On the page for April 23, 1951, with reference to "lookouts", it appears that Hutchison was on duty as a lookout, and presumably awake, from midnight April 22, 1951 to 8:00 a.m. April 23, 1951. The pages for April 24, 1951, show that the weather conditions were clear at Baltimore, Maryland, from 1:00 a.m. to midnight, with the exception of high, thin clouds at 4:00 p.m. Presumably, there being no evidence to the contrary, the sun was shining at Baltimore, Maryland, from sunrise to sunset on said date. Said pages also show that stevedores were working in the No. 1 and No. 4 holds and that at 8:00 a.m. the crew turned to cleaning holds. (Obviously referring to hold No. 2 where Amundsen testified he worked and that Hutchison worked; and to hold No. 3 in which Kalnin testified that Hutchison had been working before Kalnin saw him come out of the masthouse door at about ten minutes to 12:00 A.M. on said date.) The log entry in April 24, 1951, also shows that at 5:15 p.m. "Olive Kupau, A.B., reported for duty".

Defendant-appellant produced the oral testimony of two witnesses, Webb and Dyer, with respect to the subject matters of liability, contributory negligence and negligence on the part of N. P. Hutchison as the sole proximate cause of his injuries and death. The substance of the testimony of these witnesses is as follows:

(a) Webb. My occupation is marine surveyor and has been around nine years, employed by United States Salvage Association, the headquarters of which are in New York City. I was present aboard the "Linfield Victory" at the time Mr. George Wise, one of plaintiff's attorneys,

went aboard. Walter Haines and a photographer were with the party. Walter Haines is a marine surveyor in Portland, Oregon. It was 10:00 a.m. on May 10, 1952, a clear day, when we went aboard. I and Mr. Haines, in conjunction with each other, measured the *openings going down* in the *forward end of No. 3 hold* and the *after end of No. 2 hold* on the left-hand side, looking forward; measured the stanchion, the pipe railings and other matters *in and about the masthouse*. The diagram prepared by Mr. Haines (Plaintiff's Exhibit 12) shows various measurements. They appear to be the measurements I and he took at the time. At the time we took these measurements we were inside the portion of the masthouse where the ventilator shaft and the escape shaft are located on the port side of the masthouse No. 2. The access door which is shown here in Plaintiff's Exhibit No. 3 was both *opened and closed* when I and Mr. Webb were in there taking these *measurements*. While it was opened I took measurements and made notes of them. While the door was opened I did not have any difficulty in seeing the figures on the rule or seeing any of the devices in and about the upper area of the masthouse. "Q. State whether there was or was not any artificial illumination inside the masthouse when you had the door open and you and Mr. Haines were measuring these things and making your notes? A. As far as I can remember—I have no notes on that—there was a cluster light or a cargo light that was *dropped down there during that period of time*"; *down into No. 2 ventilator*. (The cluster light and the No. 2 ventilator referred to are shown in Plaintiff's Exhibit No. 10.) Up on *top*, in the *masthouse itself*, while making my measurements, I had only the lights from the cowling ventilator and the door. We asked to have lights put in there during the time of our survey. In that mast-

house, with the door open and without artificial illumination, you could see your protective hand rails, your opening and your ladder leading down into the forward end of No. 3 hold. There was no difficulty about observing those things without artificial illumination. There was some light inside the masthouse when the door was closed when there was no artificial illumination in there on that day. That light came from the ventilator, the same ventilator cowl that Captain Crawford described. My description of that ventilator shaft, from having observed it personally, would be very near the same as his. There was nothing other than a hollow tube with a wire screen on both tanks. (Sic: obviously an error of the court reporter. The word "tanks" should be "ends".) The only thing to restrict the incoming of light from the outside would be the screens. I closed the masthouse door at a time when there was no artificial illumination in there. When I did close the masthouse door, and without any artificial illumination inside the masthouse, I could see with just the daylight that came through the ventilator cowl your (the) opening and your (the) hand rails way down in the hold. I could see the top of the ladder. I could see the hand rails or guard rails around the ventilator shaft without any difficulty at all. I do not mean by that, that the light on the inside was the same as the light on the outside. It is my testimony that the light inside was diminished and in order to do my surveying properly I needed light. When I was up there I observed an electrical appliance outlet, which is plugged in, right alongside the jumbo boom, on the after bulkhead of the masthouse. (R.T. pp. 232-238; T.R. 232-254.)

(b) Dyer. I live in Portland, Oregon. I am employed by Pacific-Atlantic Steamship Co. as marine superintendent. In that capacity I have charge of, inso-

far as operation of vessels may be concerned, maintaining, storing, repairing and general navigation. I am and have been fully licensed as a master mariner since 1926. I am or was familiar with the steamship "Linfield Victory" in 1951. That vessel was owned by the United States of America, Department of Commerce, Maritime Administration. It was bare-boat chartered to Pacific-Atlantic Steamship Co., including the period of the month of April, 1951. The vessel was in the process or course of an intercoastal voyage when it was in Baltimore, Maryland, in April, 1951. In cases of that kind, shipping articles are required to be signed by the master and all members of the crew who are members of the crew for such a voyage (intercoastal). The photostatic copy of shipping articles I have in my hand is a photostatic copy of regular intercoastal shipping articles involving the period mentioned. Those articles (were) opened in Portland, March 10, 1951 and were closed at San Francisco on May 28, 1951. The object which appears in the lower right-hand corner of the space just inside the open locker door on Plaintiff's Exhibit 4, a photograph, is a portable cargo light. The object immediately below the arrow, identified as "E.O.", Plaintiff's Exhibit No. 7, is a marine outlet, an outlet for an electric current for plugging in lights. In the event it is dark any place in a hold or in a masthouse a cargo light may be used for the purpose of supplying artificial illumination; that is their purpose. It is the right of any member of the crew to take such a light and use it in case he desires to do so; we have no restrictions on their use of the lights. Requisition No. 1, dated March 9, 1951, shows that there were 22 cargo lights on hand on the vessel on that date. The licensed officers ordered an additional four. These four lights referred to in the requisition were delivered to the vessel before the com-

mencement of that voyage. I have been in masthouse No. 2 of the "Linfield Victory" and in the masthouse No. 2 in many other Victory ships. Pacific-Atlantic Steamship Company handled for the United States Government, so far as shoreside business was concerned, 36 or 37 Victory-type vessels, besides six that we purchased outright. We had five or six under bare-boat charter. The others were operated by the Government under this general agency agreement for operation for the Government. In those cases, where the Government retained the right to operate the ship and my company acted merely as general agent, I went aboard those ships; I visited them frequently. I have been present quite frequently while Coast Guard inspectors were inspecting Victory ships, sometimes in Portland; sometimes Seattle. I have seen it done both places. In the *course of the inspections* made by the *Coast Guard* inspectors, *their inspection includes* the *entire vessel, all* cargo spaces and *masthouses,* with the exception of the double-bottomed tanks or fuel oil tanks. Those are not in the masthouse. In all of the Victory ships that I have seen, I have not seen any which were any different than the No. 2 masthouse as shown in these photographs taken of the "Linfield Victory". With reference to these shafts, I see in this picture here, Plaintiff's Exhibit No. 1, where there is a steel plate which goes across the top of the sheet of steel which separates these two shafts. This picture (Plaintiff's Exhibit No. 10) shows a view down the ventilator shaft in No. 2 masthouse. With reference to the screen down at the bottom of that shaft, it leads to the No. 2 lower hold. No. 2 lower hold would be the hold which is covered by the hatch covers immediately forward of the masthouse as shown in Plaintiff's Exhibits 7 and 8. If you cut out this screen (referring to the screen at the bottom of the ventilator shaft) there would not be any obstruction

whatever between the bottom of the ventilator shaft and lower hold No. 2. "Q. Now, Captain, there has been some testimony here by the boatswain to the effect that the after portion of Hatch No. 3 was uncovered on April 24, 1951, at the time when Mr. Hutchison and other men were working down there in the lower tween deck, in Hold No. 3, and that the winches were being operated to take out dirt slings. Now, under those circumstances, Captain, where does the man operating the winches stand? Would he be back here at the winches, immediately at the after end of Hatch No. 3? A. He would be on the after end of Hatch No. 3 facing the masthouse. Q. Facing Masthouse No. 2? A. Yes. Q. Does the expression 'I am standing by the winches' what does that mean? A. It means he would be standing by the throttles of the winches. There are two winches, operated by one man. Q. So he would be—— A. Controls would be together in the center of the hatch. Q. He would be operating the winches then? A. Yes." If a man is standing at the winches, at the after end of hatch No. 3, he would be facing forward. The entire deck forward of the after end of hatch No. 3 would be visible to him. The door to that portion of the masthouse containing the ventilator shaft and the escape shaft would also be visible to such a man. A man walking on deck and approaching the door to that masthouse would be visible to the individual who is standing at the winches. I have been on board the "Linfield Victory", recently in Oakland, about the middle of August, 1955. The vessel was docked at the Oakland Army Base. The United States is now operating that ship. My company is acting as general agent for it. I went in masthouse No. 2 on the occasion in the middle of August when I was up there in Oakland. The inside of the masthouse was no differ-

ent in the slightest particular than indicated in these photographs on the board, so far as physical appearance is concerned. (Plaintiff's Exhibits 1-11, inclusive, all of which had been thumbtacked to a blackboard.) The inside of the masthouse was the same as it was from the time we took delivery of her. That vessel had been inspected by Coast Guard inspectors since April, 1951, at the regular annual inspection. While she was laid up in fleet reserve they wouldn't hold the inspections, but she was re-inspected when we took her out early this year. When you climb down this ladder where Mr. Wise appears in Plaintiff's Exhibit 1, and you want to go into the deck immediately below the main deck or the deck immediately below the last one mentioned, to wit, two decks below the main deck, you get from the ladder into the hold by a door opening at the side; a man who goes down would step on a plate at the particular deck level he would want. There is a door that opens and you walk into the particular hold. The after section of hatch No. 3 was open on the day when I examined the "Linfield Victory" in the middle of August, 1955, at Oakland. The vessel, so far as hatches were concerned, was in the same general condition, the physical layout, as in 1951. The hatches and the size of the holds and so forth were the same. With the after section of hatch No. 3 removed I could see some light coming through the door openings, that I have referred to, leading from the lower holds into that escape ladder shaft. On the day when I examined the "Linfield Victory" it had these ventilator cowls on the masthouse. I went inside masthouse No. 2. I closed the door and dogged it down. That door can be dogged or undogged either from the outside or the inside. A dog is just an iron rod which is hinged or swiveled at one end. You just take hold of it and pull it down and it goes

against a wedge shaped piece of metal and that pressure pushes a door closed so that it is watertight. I went in there and dogged (the door to) that portion of masthouse No. 2 containing the ventilator shaft and the escape shaft referred to in these photographs. It was a clear day. When I went inside, with the door closed, there was light which came in through the ventilator cowl. It was quite light. There was ample to see your way around. I could see the stanchion, the pipe railings, the ladder and that there were two shafts there, very plainly. I also went inside the masthouse with the door open. "Q. And what was the condition of visibility in there with reference to whether you could or could not read ordinary newspaper print? A. Well, I believe that I could have read print inside as well as out, provided I had my glasses." The ship was operated by the Government. All of these things I testified to have reference to physical things I say I observed when I went in that masthouse. *I understand, of course, that if I have testified to anything which is not true, it would be a very simple matter for the proper authorities to check up on me by going into that masthouse themselves. I realize that my testimony about the condition of visibility inside that masthouse relates to a material fact in this case.* There was no custom that I know of, in April, 1951, with reference to searching a ship for a man, not on articles, who fails to show up at the appointed time for his job, when the ship is tied up at a dock in any city in the United States. I have never heard of any such thing. When seamen are not on articles they can quit any time they want to. "Q. They just walk off and say nothing? A. Well, they come back to claim their pay. But that is quite often what happens. They will just walk off and come back later, or come back to the office and claim their

pay." The log entry in Plaintiff's Exhibit 15 under date of Tuesday, April 24, 1951, "1715 Olive Kupau, A.B. reported for duty" means that at 5:15 p.m. on that day an able-bodied seaman named Kupau reported for duty. "Q. Captain, it appears here in the record that Ernest Kalnin, the boatswain, gave testimony at an investigating unit of the Coast Guard at Philadelphia, on May 1, 1951. I would like to ask you, Captain, whether that is the same branch of the Government I am talking about, the Coast Guard, the same branch of the Government of the United States as conducts the inspection and certification of vessels of the type of the 'Linfield Victory'? A. That is correct." With reference to these other Victory ships that my company owns, and those which it has operated under bare-boat charters, and those with reference to which it has acted as general agent for the United States, each and every one of those ships was inspected and a regular certificate of inspection issued for each and every one of them by the Coast Guard. "Q. Did all of these inspections occur at either Portland or Seattle, or were they inspected at times throughout the United States? A. Oh, they were inspected at times throughout the United States, wherever—— Q. So there would be many different inspectors who inspected and passed these vessels? A. Wherever the certificate expires, there you have to have—the first American port, has to be inspected."

(The following testimony of Dyer was given on cross-examination.) I have never tried to read a newspaper in that masthouse, even with my glasses. You call my attention to Plaintiff's Exhibit No. 4, the starboard side of the masthouse. From the very top, this is a cowl for the starboard ventilator shaft. That shaft goes down to the lower hold, the same as the one on the port side. Looking

in there is something which blocks that off; bulkhead. This shaft is not like this one here, indicating Plaintiff's Exhibit No. 1. The starboard shaft is not available from this end. In my experience I have never at any time seen a screen or a grate of any kind over the head of a ventilator shaft on a Victory ship. I have never seen them on any other kind of ships. Referring to Plaintiff's Exhibit No. 4, the masthouse on the starboard side, I pointed out a cargo light. That particular object there is a portable cargo light. If a seaman wanted to use a portable light in masthouse No. 2 on the port side he would connect it at this outlet right here, this place marked on Plaintiff's Exhibit No. 7 as "Electrical Outlet." If a person wanted to use this light inside of masthouse No. 2 on the port side he could not close that door and have a cord go through that dogged door. "Q. A last question, Captain: When you were in masthouse No. 2 on the 'Linfield Victory', with the door closed, was the light on the inside the same as the light out on the deck, without a covering? A. You mean was— Q. Was the illumination as bright? A. Oh, no, naturally it couldn't be. Q. With the door open was it as bright? A. No."

(Re-direct Examination) There was no way for any seaman or anybody else to get into that portion of masthouse No. 2 where the ventilator shaft and the escape shaft were located, from the main deck, without opening the door and walking through it; that is the only access. On these Victory ships there are ladders at the forward and after hatch coamings of hold No. 3. It would be perfectly possible for a man to go from the deck down such a ladder to a lower hold, and then walk through the door at the forward bulkhead of hold No. 3 and go from there up the ladder, in the escape shaft; he could come down one way and go up the other. After he came up this ladder, the only way he could get out of the mast-

house would be to either walk through an open door or open the door and walk out. (R.T. pp. 474-502; T.R. pp. 309-331.)

The questions involved are the following:

1. The court erred in denying defendant's written motion to strike the matter contained in Paragraph IX of the First Amended Complaint; said written motion having been filed in October, 1952; and erred in denying defendant's oral motions, during the course of the last trial, to strike said matter.

2. The court erred in denying defendant's motion for a directed verdict with respect to the matter set forth in Paragraph IX "That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to-wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the Port of Philadelphia, State of Pennsylvania."

3. The court erred in permitting the plaintiff to introduce irrelevant, immaterial, impertinent, and passion and prejudice arousing evidence upon the subject of defendant's failure to search for and discover Hutchison at the bottom of said ventilating shaft in an injured condition prior to his death.

4. The court erred in denying defendant's oral motions to withdraw the subject of defendant's failure to search for and discover Nathanael P. Hutchison in an injured condition and prior to his death from the consideration of the jury.

5. The court erred in denying defendant's motion for a directed verdict, at the close of the evidence offered by the plaintiff, with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

6. The court erred in each and every ruling, order, decision or action adverse to the defendant, appearing within and shown by the matters and things included within defendant's designation of the record on appeal; and in this respect, defendant contends that none of said rulings, orders, decisions or actions was invited, encouraged, or waived or consented to at any time or in any manner whatsoever or at all, by reason of any act or omission of defendant.

7. The court erred in denying defendant's motion, at the close of all of the evidence, for a directed verdict in favor of defendant with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

8. The court erred in denying defendant's motion for judgment notwithstanding the verdict with respect to the claim designated in the first amended complaint as the "Second Cause of Action"; and in its ruling denying defendant's alternative motion for a new trial with respect thereto; and there was an abuse of judicial discretion in the ruling of the court with respect to said alternative motion for a new trial.

9. The court erred in refusing to give to the defendant reasonable time and opportunity to assign as error the giving of, and the failure to give, instructions in that defendant's attorney was arbitrarily denied a reasonably sufficient time and opportunity to state distinctly the matter to which the defendant objected and the grounds of its objections.

10. The evidence is insufficient to support the finding of the jury that at the time Nathanael P. Hutchison suffered the personal injuries from which he died the said Hutchison was acting or engaged in the course of his employment.

11. The evidence is insufficient to support a finding that there was an insufficiency in the appliances in and about the ventilator shaft referred to in Paragraph VIII of the first amended complaint or that, in this respect, there was a failure on the part of the defendant to provide a reasonably safe place in which to work.

12. The evidence is insufficient to support a finding that there was an insufficiency, due to defendant's negligence, in its safety appliances in and about the ventilator shaft or that, in this respect, there was a negligent failure on the part of the defendant to provide a reasonably safe place in which to work.

13. The evidence is insufficient to support findings in favor of the plaintiff with respect to the issues of material fact raised by those averments set forth in Paragraphs IV, VII and VIII of the claim designated in the first amended complaint as "First Cause of Action" and incorporated by reference thereto in the "Second Cause of Action" and the averments of Paragraph II of said "Second Cause of Action" which are denied in defendant's answer.

14. The evidence is insufficient to support a finding that Nathanael P. Hutchison fell into or was precipitated to the bottom of said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

15. The evidence is insufficient to support a finding that said ventilator shaft was an open ventilator shaft.

16. The evidence fails to show actionable negligence on the part of defendant as averred in the first amended complaint.

17. The jury erroneously failed to find that negligence on the part of Nathanael P. Hutchison was the sole proximate cause of his death.

18. The evidence is insufficient to support the finding of the jury that negligence on the part of Nathanael P. Hutchison did not proximately contribute to his death to any extent or proportion in excess of 10 percent of the total proximate cause of said death.

19. The evidence is insufficient to support the finding of the jury that plaintiff suffered damage in the sum of Fifty Thousand Dollars ($50,000.00).

20. There was irregularity in the proceedings, acts and conduct of the court, jury and plaintiff's attorneys and orders of the court and abuse of judicial discretion, by which the defendant was prevented from having a fair trial.

21. Excessive damages were awerded under the influence of passion and prejudice and arbitrary conduct upon the part of the jury.

22. The court erred in admitting into evidence the testimony of Amundsen with respect to screens over the top of ventilator shafts on other ships, horizontal bars precluding entry into the access shaft adjacent to said ventilator shaft on other ships; that he had never seen on any other ship a ventilator shaft without a ladder therein; and those portions of the testimony of Castle that there was no protective screen over the top of the ventilator shaft and that with the door to the masthouse closed it was quite dark inside said masthouse; and the testimony of John Hutchison (brother of the deceased) that with the masthouse door closed there was absolute darkness inside said masthouse; and the testimony and conclusions of Crawford with respect to the subjects of custom or practice, and thorough illumination of all areas of work; and with respect to heavy vertical screens in place of the pipe railings; that the ventilator shaft was a dangerous area; and that said ventilator shaft was adjacent to an area of access.

23. The court erred in refusing to grant defendant's motions, and each thereof, to strike testimony and other evidence with respect to the issue of actionable negligence upon the grounds stated in such motions, and each thereof, and in accordance with such motions, and each thereof.

24. The court erred in instructing the jury as it did and in failing to instruct the jury in a distinct, concise, direct and impartial manner upon the law applicable to the issues of material fact with respect to *actionable* negligence raised by the averments of the first eight paragraphs of the first amended complaint which were denied by defendant in its answer thereto; and with respect to defendant's special defense premised upon negligence on the part of Hutchison proximately causing or proximately contributing to his injury or death.

25. The court erred in refusing to instruct the jury upon the essential elements of actionable negligence on the part of defendant in connection with and as limited by the averments of the first amended complaint with respect to the claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; and in the failure and refusal of the court to restrict and confine the possibility of a verdict against the defendant exclusively to said specific and only claim of alleged negligence on the part of defendant.

26. The court erred in failing and refusing in the instructions given to the jury to fairly, distinctly and accurately state and define the issues of material and pertinent fact raised by those averments of the first amended complaint denied in the answer of the defendant, or to confine the fact finding power of the jury thereto.

27. The instructions as a whole are misleading, contradictory, confusing, inaccurate, incomplete and lack distinctness. The instructions as a whole contain indiscriminate, improper, extraneous and erroneous statements and comments by the trial judge.

28. The instructions as a whole contain inaccurate, irrelevant and improper interpolations by the trial judge having no legitimate bases in the law applicable to the genuine issues of material fact or the material, relevant and competent evidence and not necessary for the proper guidance of the jury in its deliberations.

29. There was an erroneous failure of the court in the instructions given to the jury of its own motion, fairly or completely or at all, to state or define the *issues* of material fact raised by the material and pertinent averments of the first amended complaint and the denials thereof in defendant's answer thereto; and erroneous failure of the court to instruct the jury with respect to the sole statutory basis of possible liability on the part of the defendant as to plaintiff's claim for damages by reason of the death of Nathanael P. Hutchison; an erroneous failure of the court to instruct the jury with respect to the essential elements of actionable negligence on the part of the defendant in connection with and as limited by the averments of a claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; an erroneous failure of the court to properly instruct with respect to the burden of proof imposed upon the plaintiff and defendant or to fully instruct thereon; an erroneous refusal of the court to properly or adequately instruct the jury with respect to the duties imposed by law upon the defendant and Nathanael P. Hutchison upon the subjects of actionable

negligence on the part of the defendant, contributory negligence on the part of Nathanael P. Hutchison, and negligence on the part of the latter as a sole proximate cause of his injuries and death; and the instructions given to the jury by the court of its own motion are indistinct, incomplete, inadequate, inaccurate and unfair to the defendant and do not cover the law applicable to legal liability imposed by the Jones Act, the issues of material and pertinent fact raised by the pleadings or the competent, relevant and material evidence introduced by the respective parties; the instructions given by the court of its own motion contain much matter and improper comment which is completely extraneous to proper statements of law which can be given to a jury as the law applicable to the issues and evidence in the case at bar; the court in its instructions interpolated and made improper, unfair and inaccurate comments with respect to the effect and weight of evidence, the elements of actionable negligence on the part of defendant, contributory negligence on the part of Nathanael P. Hutchison, the subject of damages and other matters; the court improperly instructed and commented with respect to disputed questions of fact and also gave contradictory instructions thereon; the court improperly refused to give correct instructions upon the applicable principles of law as requested by the defendant or to give, in lieu thereof, the substance of those portions of defendant's proposed instructions which are not covered in substance or at all in the instructions actually given to the jury; and in particular, the court improperly refused to give or to otherwise correctly or adequately cover applicable principles of law contained in the following instructions proposed by the defendant: Numbers 1, 5, 6, 10, 11, 11A, 12, 13, 14, 14A, 15, 15A, 16, 16A, 17, 18, 19, 19A, 23, 24, 25, 28, 29, 30, 30A, 31, 31A, 32, 32A, 33, 34, 35, 35A, 36, 36A, 38,

39, 40, 40A, 41, 42, 43, 44A, 45, 45A, 47, 49, 51, 52, 53, 54, 55, 55A, 56, 57, 57A, 58, 58A, 59, 60, 65 and 66.

30. The court improperly refused to submit to the jury and require an answer to defendant's proposed interrogatory No. 3, which reads as follows: "On what date and at what time on said date did Nathanael P. Hutchison come in contact with the bottom of the ventilator shaft?"

III.

SPECIFICATION OF ERRORS.

Appellant specifies the following as assigned errors relied upon by it in the presentation of its contentions on appeal:

Points 1 to 30 in the "Statement of the Points on which Appellant Intends to Rely", *supra,* pp. 45-52, are by reference thereto adopted as assigned errors 1 to 30, inclusive.

31. The court erred in denying the oral motion to dismiss the purported claim set forth in paragraph IX, made upon the ground that paragraph IX does not aver facts sufficient to show that the plaintiff is entitled to relief. (R.T. pp. 411-415; T.R. pp. 304-308.)

32. The court erred in admitting and refusing to strike (where such motions were made) the following evidence:

(a) (Testimony of Amundsen): The arrangement of the "Linfield Victory" was different from the arrangement I was familiar with on other ships in that "other ships got screens down here, and stuff like that" over the openings of the ventilator shaft. (R.T. p. 88; T.R. p. 142.) I have not seen on other ships, in masthouses, a ventilator opening without a ladder going down it; this is the first time I have ever seen it. (R.T. p. 88; T.R. p. 143.) I have been on other ships that have access ladders in the

masthouse. The arrangement of the guard rails appears to be different than those on other ships I have served on. On other ships the bars go right across the area above the starboard edge of the access shaft where the ladder is. (R.T. pp. 84, 85, and 100; T.R. pp. 139-154.) The lines which had been placed on the photograph, Plaintiff's Exhibit 2, and identified by the letters "AA" and "AA" were received in evidence for consideration by the jury. (R.T. pp. 104-105; T.R. pp. 157-158.)

(b) (Testimony of Crawford): In the course of my experience aboard ships I have observed or know of a custom with regard to accounting for men. (R.T. p. 205; T.R. p. 226); that custom, in effect, to the best of my knowledge and belief, on April 24, 1951, was to account for the working hours and places of each member of the crew *at all times;* and to the best of my knowledge, there was a custom to account for men who were missing. That custom was to determine when a man was assigned to any particular work that he performed that work so that an accounting could be kept in a logical way of his man hours; and if a man were missing there was, to the best of my knowledge, a custom for ascertaining his whereabouts. The custom in the case of a missing man is that his (absence is) reported to his immediate superior or executive of the particular department; deck, engine or steward. That executive of the department then institutes a search to determine the whereabouts of the missing man, if that is possible. That search would necessarily include an inspection of the man's living quarters, eating quarters and working quarters on the vessel, but should perhaps include every portion of the vessel. I have observed or know of a custom with respect to the illumination of areas, work areas aboard a ship, such as a masthouse. That custom is to thoroughly illuminate any area in which a man or men are working. In

the course of my experience I have seen other *protective* devices such as these guard rails around the ventilator shaft. I have seen a heavy screen which *excludes* the *danger;* which would *exclude* a *dangerous area* when there was an *area of access immediately close* to it or *in the vicinity.* (R.T. pp. 209-215; T.R. pp. 229-235.)

(c) (Testimony of Castle): "Q. Did you note any screen or other *protective* covering surrounding the ventilating shaft? A. There was no screen over the ventilating shaft at all. It was open on the top." (R.T. p. 200; T.R. pp. 222-223); I went aboard the "Linfield Victory" in the latter part of May, 1957, in San Francisco. (R.T. 197; T.R. p. 220); the mate and I *closed the door to the masthouse* to see just how dark it was in there. It was quite dark and this was in late forenoon. (R.T. p. 199; T.R. p. 222.) When I went aboard the "Linfield Victory" in the latter part of May, 1951, in San Francisco, I introduced myself to the chief officer who was on duty and he showed me the space involved. I don't recall his name. I know he was the same mate that was on there when the accident occurred. He stated to me that he was the same mate that was on there when the accident occurred. (R.T. pp. 197-198; T.R. pp. 220-221.) He showed me this ladder and trunk on the port side, and explained how the body was found, the position in which it lay. (R.T. pp. 198-199; T.R. pp. 221-222.)

(d) (Testimony of Kalnin): When a conclusion that the man had just gone ashore is not reached I conduct a search on a ship. (R.T. p. 191; T.R. p. 215.)

(e) (Testimony of Adelstein): If an autopsy report showed the cause of death to be subdural hemorrhage and fractured skull I customarily regard that as valid. (R.T. p. 471.)

(f) (Testimony of John Hutchison): On May 27, 1951, in the morning, before noon, a bright day, I went

inside the masthouse and *closed the door* after I went in. I did not see around; no light; no window, transom or skylight in the masthouse; no light coming through the crack of the door. It was absolute darkness when the door was *closed*. (R.T. pp. 351-354; T.R. pp. 286-287.)

(g) (Defendant's admission in response to written requests therefor): The court received in evidence defendant's admission that on April 24, 1951, "there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which the body of Nathanael Patrick Hutchison was found on April 30, 1951." (R.T. pp. 308-331; T.R. pp. 265-268.)

(h) Testimony of Dickerson): Acute dilatation of the heart "to some doctors may mean that, and again to the same man or well-trained man, it may not be acute dilatation. It is a relative term". It means one thing to one doctor and another to another. It is not a precise term; some conditions are referred to as acute dilatation by one doctor, which another doctor would not use that term in referring to. (R.T. pp. 513-555.) On the basis of the assumed facts in the hypothetical question I have an opinion as to what could be done to save a man's life having experienced such injuries. The proper procedure would be the immediate opening of the head to evacuate the blood clot. (R.T. pp. 517-518.)

In the absence of the jury, prior to the introduction of any evidence, the trial judge was informed with respect to objections and ruled that each question asked of any witness whether by deposition or otherwise would be deemed objected to upon specified grounds and that each answer would be deemed subject to a motion to strike upon the same grounds. (R.T. pp. 2-43; T.R. pp. 102-128.)

1. The objections to testimony with respect to what witnesses had seen on other ships as compared with the

physical design and construction of masthouse No. 2, the shafts therein and its appurtenances and the adverse rulings are set forth in the record. (R.T. pp. 2-43; T.R. pp. 102-128.)

The grounds of the objections and motions to strike are as follows: There is no foundation laid. There is no relevancy to the specific issue alleged in the amended complaint. The conduct of others must have occurred under circumstances substantially similar. We are dealing here with a specific part of a cargo vessel, to wit, a masthouse. (R.T. pp. 5-6; T.R. pp. 102-103.) What I am talking about is the masthouse. That is the only area which is involved in this case and the only area which is referred to in the pleadings. (R.T. p. 9; T.R. pp. 104-105.) (1) The evidence is immaterial; (2) the evidence is irrelevant; (3) the evidence is incompetent; (4) there is no proper foundation laid; (5) the evidence goes outside of the specific issue with reference to alleged negligence as set forth in the plaintiff's complaint, which refers solely and only to the ventilator shaft in masthouse No. 2, the allegation being that the defendant negligently "failed and neglected to supply sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work." (R.T. pp. 9-10; T.R. pp. 105-106.) The objection as to foundation goes to lack of foundation in that the witness would not have had observation of a masthouse aperture of the nature involved in this particular litigation, unless the witness specifically so stated. The objection with reference to the subject of foundation is the same as that with reference to competency, materiality or relevancy, and it is premised in part upon the rule that the conduct of others must have occurred under circumstances substantially similar to those

existing in the case at bar. (R.T. pp. 11-12; T.R. pp. 106-107.)

The marks placed on Plaintiff's Exhibit 2 by Amundsen for the purpose of comparison with other vessels were admitted subject to the same objection. (R.T. p. 83; T.R. p. 138.)

Defendant objected additionally and particularly to the question put to Crawford as to whether he had seen "other protective devices such as the guard rails around the ventilator shaft", upon the ground that it called for a conclusion; and a motion to strike his answer that the purpose of a heavy screen was to exclude a dangerous area when there was an area of access immediately close to it or in the vicinity, was made on the same ground. (R.T. pp. 214-215; T.R. pp. 234-235.)

After both sides had rested, defendant also moved to strike Crawford's testimony that he had observed heavy screens located where the pipe railings are located in Plaintiff's Exhibits Nos. 1, 2 and 3, upon the grounds that there is no evidence showing that it amounted to a custom or that the conditions were substantially similar, or that it amounted to any more than single instance of what he had observed some individual shipowner may have done. (R.T. p. 576; T.R. p. 336.)

2. The grounds of the objections to the testimony of Crawford and Kalnin with respect to alleged customs and the motions to strike are as follows: Any question asking any witness "what is the custom or practice" or "Do you know of a custom or practice" calls for a conclusion. The only way in which to prove custom or practice, in the face of an objection, is to establish a series of things actually observed by witnesses, the sum total of which would enable a jury perhaps to find, as a question of fact, there was a custom or there was a practice. (R.T. pp. 13-14; T.R. pp. 108-109.) Custom or prac-

tice is not a subject of expert testimony. The question assumes there is a custom or practice and permits the witness to express a conclusion that there is such custom or practice. You are permitting the witness to decide for himself what constitutes a custom or practice when he is not qualified to do so. (R.T. p. 16; T.R. p. 110-111.) The witness is required to give those specific instances and to describe the particular part of the vessel involved, so as to bring it within an area like the one we have involved here. (This particular objection also applies to the subject matter of what any particular witness claimed to have observed on "other ships" or "some other ships.") (R.T. p. 19; T.R. p. 113.) Testimony as to a custom, based upon statements made by the Coast Guard or at lectures would be hearsay; any questions about what anybody had heard at any lectures or what anybody else told him would be hearsay and a repetition of conclusions. (R.T. p. 23, T.R. p. 117.) In the event questions are asked with respect to an attempt to establish a custom or practice, the defendant objects to each such question upon the following grounds, severally and separately and distinctly, and not in the conjunctive: (1) the evidence is immaterial; (2) The evidence is irrelevant; (3) The evidence is incompetent; (4) It calls for a conclusion and opinion of the witness; (5) The opinion and conclusion of the witness is predicated upon hearsay statements or matters which he claims to have read; (6) The introduction of such evidence would deprive the defendant of due process of law; in that the defendant would have no opportunity to cross-examine the people who may have made statements to the witness upon which the witness bases a conclusion that there was a custom or practice; and with reference to books or periodicals, they could not be introduced in evidence. Therefore, any conclusions reached by the witness, as a result of reading

periodicals or books, would likewise be incompetent and hearsay. (R.T. pp. 24-25; T.R. pp. 118-119.) The objection to each question with respect to an alleged custom of conducting searches for missing crew members is deemed to physically appear in the record immediately following each question along the line of searching for missing crew members and the record is also deemed to physically show a motion to strike on the same grounds set forth in the objection. (R.T. pp. 206-207; T.R. pp. 226-227.) The evidence is entirely irrelevant and not within the issues pleaded; when any custom is relied upon it must be pleaded; they don't claim this was a custom of the defendant. (R.T. p. 207; T.R. p. 227.) A special objection and motion to strike Crawford's testimony with respect to alleged customs referred to by him, as soon as the witness stated he intended to tell about the custom as it was imparted to him from the men who executed the custom, was made upon the ground that the testimony was based on hearsay, in addition to the other grounds. (R.T. pp. 210-211-212; T.R. pp. 231-232.)

When all of plaintiff's evidence was in defendant moved the court to exclude from the consideration of the jury, in any event, the issue raised by the averments in paragraph IX that the defendant and its employees were further negligent in failing to search for and discover Hutchison in an injured condition until April 30, 1951, upon the ground, *inter alia*, that there was no evidence showing that as a proximate result of any failure to find him before he was found, he suffered injury or death. (R.T. p. 309.)

After all of the evidence was in and both sides had rested, defendant made a supplemental motion to strike as follows: Defendant moves the court for an order striking from the testimony of Crawford all testimony

which he gave with reference to an alleged custom of searching for missing members of the crew or absent members of the crew, and his conclusions and opinions with reference to what part of a ship should be searched, upon the following grounds: None of said evidence was competent; none of it was relevant; it was based solely, insofar as 1951 was concerned, upon what he had read in books and what he had been told, to-wit, hearsay; so far as what parts of a ship should be searched when a seaman not on articles is missing or absent from work is concerned, that stated a pure, unadulterated conclusion; there is no evidence of any kind or character with reference to the existence of any such custom at Baltimore, Maryland, in April, 1951, and no reference to any such custom pursuant to the particular vessel, to-wit, the "Linfield Victory". (R.T. pp. 575-576; T.R. pp. 335-336.) Long before the trial, in October, 1952, defendant objected to the subject matter of paragraph IX of the first amended complaint upon the grounds that it was immaterial, impertinent, and not within the possible factual bases of liability pursuant to the Jones Act. (T.R. pp. 8-9.)

3. The objections with respect to the subject of the lack of a permanent electrical installation inside the port compartment of masthouse No. 2; with respect to the degree of visibility therein with the door to the masthouse completely closed and hatch No. 3 completely covered; and the thorough illumination (artificial) of work areas such as a masthouse are as follows: There is no occasion for illumination in the absence of proof that a particular place is dark; a proper foundation would have to be laid showing that the masthouse was in a state of darkness at any time when Hutchison was required to use it or might properly use it in the course of his employment. Light is not required unless a place is dark.

In the absence of proof that a place of work is dark there is no relevancy to any evidence with reference to artificial illumination; with reference to this particular masthouse, on this particular ship, the question of permanent lighting fixtures, or the question of temporary lighting fixtures would not be material or relevant, in the absence of proof showing that, at any time when Hutchison was required to be there, (it was dark). (R.T. pp. 33-34; T.R. pp. 123-124.) In the absence of substantive evidence of darkness in the masthouse at the time they claim that Hutchison was in it and at the time they claim he fell into the ventilator trunk, the question of illumination is improper and there is no proper foundation laid. (R.T. pp. 35-36; T.R. pp. 125-126.) I object to that question (with respect to conditions in the masthouse with the door closed) upon the ground that it is immaterial, in that there is no evidence proving or tending to prove that the hatch door was closed at any time while Hutchison was within the masthouse or within the escape shaft in masthouse No. 2. (R.T. p. 41; T.R. pp. 127-128.) I object to the introduction of the request (1c of plaintiff's written requests for admissions) and to the introduction of either part or all of the reply upon the ground that there is no evidence in this record, direct or indirect, showing that at any time when Hutchison could have been within the area of masthouse No. 2, in the course of his employment, there was any necessity for any artificial light of any kind or character; there is no evidence, direct or indirect, showing the time of day when Hutchison got into the ventilator shaft; neither is there any evidence, direct or indirect, showing the date upon which he got into the ventilator shaft, to-wit, whether it was the 24th of April or the 25th of April. (R.T. pp. 328-331; T.R. pp. 266-267.)

4. The objections to Castle's testimony as to the identity of the mate are as follows: The question calls for hearsay; the answer states a conclusion of the witness. A motion to strike the statement "he was the same mate" was made upon the ground it states a conclusion of the witness. The question "Did he state that to you?" was objected to upon the ground it calls for hearsay; there is no evidence showing he was acting as an agent of the defendant in having a conversation with Castle. The statement "He explained how the body was found, how it lay, the position in which it lay" was subject to a motion to strike on the ground that it states a conclusion of the witness, the question is predicated upon hearsay, it is likewise incompetent. (R.T. pp. 38-41.)

5. The objection to the testimony of Dr. Adelstein with respect to the validity of an autopsy report is as follows: The question is not proper; no witness can be asked to pass on the effect of the testimony of another witness; it is immaterial; it is asking one witness to pass on the qualifications of another. (R.T. pp. 470-471.)

6. The objections to the testimony of Dr. Dickerson with respect to what the term "dilatation of the heart" may mean to doctors other than himself, was objected to upon the following grounds: It states his conclusion and opinion with reference to what Dr. Glauser may have meant when he said there was acute dilatation, and I move to strike out his conclusion that it means one thing to one doctor and another to another. (R.T. pp. 513-515.)

7. The objections to the opinion of Dr. Dickerson with respect to the proper procedure to save a man's life when the man had sustained fractures of the skull and subdural hemorrhage are as follows: It is not an issue, to-wit, what could be done by a physician and

surgeon; no proper foundation laid; it is immaterial, not relevant to any facts in issue here. (R.T. pp. 517-519.)

33. The instructions as contained in the reporter's transcript and as printed in the Transcript of Record are not the instructions as *actually* given to the jury. Appellant's motion to procure a correct record was denied by this Court on September 12, 1956. Therefore, the appellant is compelled, over its objection to deal with the instructions as they appear in the printed Transcript of Record. The Court erred in its instructions, interpolations and comments as follows:

(a) The language "you are the exclusive judges of the fact," means that so far as your decision upon the facts is concerned, "your judgment is *final,* and *no one can inquire into it.*" "But *no one officially has any power or ability to set aside your decision as to the facts* in the case." "The *litigants and the judge must accept what you return here as the verdict as to the facts.*" (R.T. pp. 756-757; T.R. pp. 493-494.)

(a-1) That law (workmens' compensation) does not apply to ships at sea, and if there is to be a recovery here it must be upon particular principles of law and because the defendant has breached some one *or more of its duties,* and that breach has been the proximate cause of the injury. (R.T. p. 759; T.R. p. 496.)

(b) A party against whom such a ~~rebuttal~~ presumption is directed, if he intends to deny it, *must,* of course, *present evidence to the contrary.* (R.T. pp. 765-766; T.R. p. 501.)

(c) Now, no expert and *no certificate of inspection* may *suffice* for your duty. To the extent that those things are in evidence, consider them as evidence, to be weighed with all the other evidence. But the sole duty, as far as the problem in this court is concerned, and so far

as that problem exists between those litigants is for you. It is your judgment and you must approach it *independently* of what *any* witness for either the plaintiff or the defendant, or *any other body or inquirer,* has had in their experience, in so far as that has been related to you. *All former inquiries have had a* somewhat *different purpose* than the inquiry which is here today. This one in this case is individual to the purposes and requirements of this case, *and to the extent that other matters, such as the inspection* and the *observations of witnesses* who have come here and told you what they have observed are concerned, you should bear in mind that *it is up to you* and you have the responsibility of deciding this case, and you do not simply rubber-stamp any opinion which has been presented here, *regardless of the form of evidence by which it has been presented.* (R.T. pp. 770-771; T.R. pp. 505-506.)

(d) Now, I am not going to read the entire Complaint to you. But I will read an excerpt from it which states what Mrs. Hutchison contends, insofar as the *heart* of *her cause of action,* the *disputed* portions of it, are concerned here.

Now, it has not been disputed, for instance, that she is the executrix or administratrix—I forget which—in any event, the person handling the affairs of the deceased or that she is the widow of the deceased, and so on. All those things she had to set forth in her complaint.

But I will read what the *lawyers* call the *charging language of her complaint* now at this time, insofar it concerns the *first* cause of action. (The court then read only the averments of paragraph VIII.) (R.T. pp. 771-773; T.R. pp. 506-507.)

(e) In the absence of knowledge or notice to the contrary, and in the absence of circumstances that caution him, or would caution a reasonably prudent person in

like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and he may rely and act on that assumption. (R.T. pp. 773-774; T.R. p. 508.)

(f) The fact that Nathanael Patrick Hutchison had not yet signed Articles at the time of receiving his personal injuries in no way deprives him of his *rights* under *the* law *upon which this action* against the Pacific-Atlantic Steamship Co. *has been predicated.* (R.T. p. 774; T.R. p. 508.)

(g) In the *event of injury* Nathanael Patrick Hutchison was *entitled* to the *rights* which the court *has* referred to and *will* refer to *in these instructions,* unless he had actually left such employment and whether or not he had commenced employment or whether or not he had left the employment are questions that are exclusively for the jury. (R.T. pp. 774-775; T.R. p. 509.)

(h) "The *gist* of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman must prove *negligence,* for unless the seaman can establish *negligence* of the *owners* of the vessel, *or her officers, agents, or employees,* no liability exists." (R.T. p. 775; T.R. p. 509.)

(i) The *negligence* of the *owners* of the vessel may consist in *the failure to supply and maintain a vessel properly equipped and manned* or the *negligence of the master or members of the crew.* (R.T. p. 775; T.R. p. 509.)

(j) Now, the *exact day,* the *exact hour* of the incident, which has been alleged to have been an accident and which has been alleged to have been due to *the failure of the defendant to use reasonable care in providing a reasonably safe place in which to work,* the *exact time* is *not* material. (R.T. p. 775; T.R. p. 509.)

(k) The *exact time of events,* if they *flowed* from *defendant's negligence,* need not be spelled out in detail by the evidence. (R.T. p. 775; T.R. pp. 509-510.)

(l) "*Negligence* is the *doing* of some *act* which a reasonably prudent person would *not* do, or the *failure* to do *some* act which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs." (R.T. p. 776; T.R. p. 510.)

(m) *If,* for instance, and this is just an illustration—I don't suggest to you it is true, *but you should consider whether it is,* and *it is an illustration of that instruction —you believe from all the evidence* that Mr. Hutchison was feeling *rugged*—whatever *that* means, but you have heard the testimony—and that he had a hangover, *then you would consider whether or not a man,* knowing that he felt rugged and having a hangover *would go into the type of act or acts in which he was engaged at the time of the injury.*

That is, would he *go about masthouses* and *climb up and down ladders* or would be take a sick-leave? Was it ordinary prudence, *was it reasonable care for him to do that?*

If you find that it was not or if you find there was some other contributory negligence—*at the moment as I sit here that is the only thing in the evidence which occurs to me,* but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was, then if you have found primary negligence, that is, negligence on the part of the defendant, you will then assign to the contributory negligence some percentage and diminish the recovery, which is allowed because of the extent to which the contributory negligence exists, if it did exist, and if primary negligence existed. (R.T. pp. 779-780; T.R. p. 513.)

(n) *There are two causes of action. Lawyers* speak of *the basis of a lawsuit* or the claimed basis of a lawsuit *as a cause of action* and *each particular basis is a cause of action in itself.* Mrs. Hutchison in her Complaint has set forth two causes of action. (R.T. p. 781; T.R. p. 514.)

(o) We have talked a lot about evidence. It might just be of use to you—I think it should be included in a charge—to read you a law dictionary definition of evidence. I have selected the one which appears in Black's Third Edition at page 696: "That which furnishes or tends to furnish proof. It is that which brings to the mind a just *conviction* of the truth or the falsehood of *any* substantive proposition which is asserted or *denied.*

"That which *demonstrates, makes clear,* or ascertains the *truth* of the *very fact or point in issue,* either on the *one side or on the other.*" (R.T. p. 784; T.R. pp. 516-517.)

(p) Now, the evidence here with respect to what the plaintiff claims was failure to search for Mr. Hutchison, under what she claims were circumstances that were such as to require a search, relates only to that first cause of action.

You will recall that there has been in issue tendered her as to how long, if at all, Mr. Hutchison was conscious after he fell into the shaft, and the only item of damage which is claimed on that first cause of action is damage for conscious pain and suffering.

Now, as has been argued here, there might have been some palliative or comforting treatment, so that evidence was admitted upon that first cause of action. It is not to be deemed to apply to the second cause of action. As I told you, there are two causes of action, each of which should be borne in mind separately.

However, the law respecting *negligence,* the law respecting *contributory negligence,* the law respecting *damages,* which I have given you, *all applies to the second*

cause of action, except that with respect to damages there are *additional* matters which I should call to your attention.

Liability, if it exists, depends on the *same* facts respecting *negligence,* if it existed, contributory negligence, if it existed, the need for proximate cause, *and so forth,* as the *first cause of action.* (R.T. pp. 785-786; T.R. pp. 517-518.)

(q) Now, I will read you just *the charging part of the Complaint* which Mrs. Hutchison has filed *on that second cause: "That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to-wit, the 30th day of April, 1951, the exact date and the time of the death being to the plaintiff unknown, that said Nathanael Patrick Hutchison left surviving him as a dependent of the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages".* (R.T. pp. 785-786; T.R. p. 518.)

(r) That second cause of action is different in this respect:—*in all other ways* it is the *same* as the *first*—in *this* respect it is different from the first, *it is Mrs. Hutchison's claim, not his.* It is her claim for damages *because she has lost her husband,* who she says was a *substantial contributor to her support,* and she says, "I have been damaged in that regard by reason of the *same* facts." *Minus the pain and suffering,* of course, but by the *same facts which produced death* in the *partial bread-winner of her family.*

So you see *this* is *her cause of action* and not his, and *if* you *decide* this one, *you decide it in her favor for the damage which she has suffered.* (R.T. pp. 786-787; T.R. pp. 518-519.)

(s) Now, all persons are presumed to use reasonable care. That is a presumption. It applies in this case to Mr. Hutchison in his activities at and about the time this incident occurred. It applies to the defendant corporation at and about the time this occurred. It is a presumption.

You are to look only to the evidence in the case. (R.T. p. 789; T.R. p. 521.)

(t) I will read them to you. "IF THE VERDICT IS IN FAVOR OF PLAINTIFF,—" Counsel, these are exactly the ones which were in the file, which have been referred to as the Court's.

"What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?"

By that we mean what was her pecuniary loss at the moment of his death, *because she had been precipitated into the state of widowhood by that death.* (R.T. p. 791; T.R. p. 523.)

(u) Now, of course, before you would find a verdict in favor of Mrs. Hutchison upon cause of action No. 2, you would have found that the defendant was guilty of *negligence* and that such negligence was a proximate cause of an injury from which Mr. Hutchison died, *and that answer is included in a verdict in favor of the plaintiff.*

But you would also then answer this interrogatory, "Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?"

We mean by *that* the *contributory negligence* that *I have dealt with in these instructions.* (R.T. p. 792; T.R. pp. 523-524.)

(v) Those are all the interrogatories.

The foreman *will fill in the answers.* The foreman *will fill in the general verdicts,* and *they* will be returned with you. (R.T. p. 794; T.R. p. 526.)

(w) The cause of action which the plaintiff has charged here was read to you earlier. She is restricted to *the cause of action* which has been *charged* there, that is, you are not to go beyond the *nature* of negligence which was charged and seek out, to see if there was some other negligence, because she has picked out what she thought was negligence and sued upon that, and the case is restricted to that. (R.T. p. 820; T.R. p. 548.)

(x) You don't have to introduce every new thing that is known to science, but you must keep your premises within which employees are required to work, or which they will use in going to or fro from work or in their reasonable access to the place of employment, you must keep those premises reasonably safe. "Reasonably" is the key word. (R.T. pp. 821-822; T.R. p. 550.)

(The foregoing instructions, interpolations and comments from (a) to (v) are from the instructions prior to the statement of defendant's exceptions and objections which it was physically possible, within the arbitrary time limit imposed upon the defendant by the Court, to state for the record. (w) and (x) are matters stated to the jury immediately prior to the time it was sent to lunch at 12:55 p.m., October 14, 1955.)

The following occurred after the jury had been deliberating until 10:23 p.m., October 14, 1955, at which time the jury returned to Court with specific written questions:

(y) Plaintiff claims that Mr. Hutchison was injured due to *the negligent failure of the defendant to provide a reasonably safe place in which to work.* That as a result of *that* the accident occurred. That Mr. Hutchison then had conscious pain and suffering, as a result of the injuries which he sustained, after the accident had occurred.

Now, the evidence about failure to conduct a search was offered and admitted and should be considered for just this purpose. You have the question.

If you find that there was liability *because* of *the failure to use reasonable care* to maintain a reasonably safe place to work, you have the question *then* of *determining what damages should be awarded.* (R.T. p. 831; T.R. p. .....)

(z) Now, if Mr. Hutchison was having conscious pain and suffering you would want to know for how long a period he had such conscious pain and suffering. And hence, the failure, if there was a failure, to search for him would be proper evidence for you to have in your mind when you consider how long that conscious pain and suffering lasted.

Now, *there is the question of whether,* under all the circumstances, *a reasonably prudent master of a vessel would have had a search made.* You will have to determine that *if* you come to *that* question.

But it all goes to the problem of how long the man lived and how his *pain and suffering* could have been *palliated or eased* if he had been *found* by a *more prompt search than the one which finally led to discovery of the body. That is how the failure to make a search enters into it.* (R.T. pp. 831-832; T.R. pp. 551-552.)

(aa) Now, these causes of action are very different, very distinct. The first one, as I told you at considerable length this morning, is *actually* a *cause of action* which has been inherited here by Mrs. Hutchison in her representative capacity, because Mr. Hutchison, who *was* the *owner* of *that cause of action,* is dead, but it is a cause of action based upon his pain and suffering, his damages suffered during his lifetime.

The second cause of action is a suit brought by a widow because of what she claims was the negligence of the defendant in having brought about the death of her husband. (R.T. p. 834; T.R. pp. 554-555.)

(bb) She says, "I have lost the support of my husband *because the Linfield Victory did not use reasonable care*

to provide my husband with a reasonably safe place within which to work, and because of *that* I claim damages against the *operators* of the Linfield Victory, the damages being the amount of money, as nearly as it can be prudently calculated, that I would have received from Mr. Hutchison had he continued to live." (R.T. p. 835; T.R. p. 555.)

(cc) Then you have asked that I read you the causes of action. I hope I can find them here among the papers we had this morning. I don't find them readily at hand. Can you hand me up the file?

Here they are. The *first* cause of action in its charging language, that is, *the essence of the complaint* reads this way: "That on or about the 24th day of April, 1951, the said steamship 'Linfield Victory' was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and the performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilator shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and

suffering; that said injuries were directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances, in and about said ventilator shaft to provide a reasonably safe place in which to work." (R.T. pp. 836-837; T.R. pp. 556-557.)

(dd) Now, I *return to reading,* and *I am reading* you the *gist* of the *second cause of action,* which, after stating that Mrs. Hutchison was the wife of Nathanael Patrick Hutchison, and that she received the usual support that a wife receives from her husband, says:

"That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to-wit, the 30th day of April, 1951, the exact date and time of the death being to the plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages" and *as a matter of law the only damage for which she could collect.*

If you find that the death was caused, as it has been alleged to have been caused, if you find, as a matter of fact, it was so caused, the only damage for which she can collect is her money loss reasonably calculated to be sustained by her by reason of the fact that she has been deprived of contribution to her support by her husband over whatever period of time you find, as reasonably prudent jurors, carefully calculating it, she has been deprived of that. (R.T. pp. 838-839; T.R. pp. 558-559.)

(ee) *And there is only one lawsuit in which she can collect, that is, she can't come back here next year and say, "I want more."* And if she dies tomorrow, and you read about it, if you have returned a verdict, you couldn't

come in and take any of it away. *You just have to determine what the natural expectancies are* and *what sum of money can be awarded today on that second cause of action.*

All this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was ". . . directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work."

That it negligently *did* that. That is the *type* of negligence that is alleged, not any other.

Foreman Eager. Your Honor.

The Court. Yes.

Foreman Eager. *Do I understand you correctly by that last remark,* that where you have referred to the *type* of negligence that is alleged in the second cause of action, *that the negligence and failure to conduct a search was not alleged in the second cause of action?*

The Court. *That is true.* You see, it couldn't enter into the second cause of action because, in any event, the woman has lost a husband.

Now, when he died if he did not die *because* of negligence she has no claim. If he did *not* die *because* of the particular *kind* of negligence charged here she has no claim upon this defendant. But if he did die *because* of the particular negligence, which has been charged here, then her right accrued the moment he died.

And it wouldn't make any difference whether he was immediately discovered, whether his body was immediately discovered or whether it wasn't. It wouldn't have made any difference if they had seen him fall and had immediately taken him to a hospital, and he had had the best of care and comfort and was given sedatives so that he didn't

suffer at all. But, nonetheless, he died. (R.T. pp. 839-840; T.R. pp. 559-560.)

(ff) *Her cause of action* is *based* upon the *fact* that *she has lost the support of that husband due to the negligence of the defendant, meaning the particular kind of negligence which has been charged here.*

And that doesn't include the making of a search for him, but it does include, of course, and is based upon his death under the circumstances which she has claimed brought that death about.

So whether a search was made or not has nothing to do with the second cause of action. It might have something to do with the first cause of action; that is up to you. (R.T. pp. 840-841; T.R. p. 560.)

(gg) Foreman Eager. *Your Honor, I feel sure* that *some jurors still feel that they should be permitted to consider the matter of negligence in not conducting a search, in connection with* the cause of action, *the second cause of action.* If you wish, I can tell you why.

The Court. It would be unlawful for you to tell me why. We are a court of law, so we have to live by it.

Foreman Eager. Will you tell us, *is it because it was not set forth in the complaint, is that the reason we cannot consider it?*

The Court. *No.* No, *that is not the reason.* The reason is that the law just does not allow damages for failure to make the search, that is, it does not allow damages to the widow.

Of course, there might conceivably be some situations in human affairs where there would be such a cause of action, but this is not that kind of a suit.

This is a suit brought by a woman who says, "*I was the dependent wife or partially dependent wife of a man who had been killed due to particular negligence of the defendant.*"

And if she is right in that, then she is entitled to be compensated for her money loss. The law is very hard on all matters. It takes the view that a money loss is what is compensated in courts and *money loss is what she suffered.* (R.T. pp. 843-844; T.R. pp. 562-563.)

34. The Court erred in refusing to instruct the jury in accordance with written requests of the defendant, or in substance or legal effect, as follows:

(a) On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. (No. 1; T.R. p. 24.)

(b) On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: It is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. (No. 6; T.R. p. 26.)

(c) You shall not consider as evidence any statements of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the Court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. (No. 10; T.R. pp. 28-29.)

(d) The plaintiff Emma Hutchison is the administratrix of the estate of Nathanael Patrick Hutchison, deceased. She is also the surviving widow of Nathanael Patrick Hutchison. She has filed a complaint pursuant to which she claims that she is entitled to recover damages from the defendant Pacific-Atlantic Steamship Company. This complaint contains two separate and distinct claims. In the first of these claims she contends that Nathanael Patrick Hutchison sustained conscious pain and suffering between the time he was injured and the time of his death. In the second claim set forth in the complaint she contends that she, as the surviving widow of Nathanael Patrick Hutchison, has suffered damage as a direct consequence of his death. The fact that she has filed the complaint does not carry with it any implication that she is actually entitled to recover any damage by reason of either of said claims.

The plaintiff, in her complaint, avers that Nathanael Patrick Hutchison suffered personal injuries in the course of his employment and that said injuries were directly caused by reason of negligence of the defendant in that, as she contends, it failed and neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about a ventilator shaft to provide a reasonably safe place in which to work and that as a proximate result thereof the said Nathanael Patrick Hutchison fell into the ventilator shaft thereby causing him to sustain during his lifetime personal injuries and conscious pain and suffering and that as a further proximate result thereof the said Nathanael Patrick Hutchison died.

Plaintiff avers in Paragraph VII of her complaint that on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard the

SS "Linfield Victory" as an able-bodied seaman with deck maintenance duties. She also alleges in Paragraph VIII of her complaint that on or about the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and located directly adjacent to an open ventilating shaft; and that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft.

With reference to the averments in Paragraph VII of the complaint, the defendant in its answer admits that during a part of said 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an able bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty. The defendant also, in answering the averments of Paragraph VIII of plaintiff's complaint, denies that at any time after 12:30 p.m.

on the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant as an able-bodied seaman or in any other capacity. In other words, the defendant denies that the relationship of employer and employee existed between it and Nathanael Patrick Hutchison at any time after approximately 12:30 p.m. on the 24th day of April, 1951.

In its answer to the averments in Paragraph VIII of the plaintiff's complaint, the defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland, and that from 8:00 a.m. of said day until 10 minutes of 12:00 a.m. on said date, Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant, with other employees of said defendant. Every other averment set forth in Paragraph VIII of plaintiff's complaint is denied in the answer of the defendant.

A statute enacted by the Congress of the United States provides that in case of the death of any seaman as a result of personal injury suffered in the course of his employment, the personal representative of such seaman may maintain an action for damages and that the employer of such deceased seaman shall be liable in damages to his personal representative for the benefit of the surviving widow for such death resulting in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances. Said statute enacted by the Congress also provides that any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law in the event such injury results in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances and that such right of action shall survive to his personal representative,

for the benefit of the surviving widow of such seaman.

The material issues of fact with respect to the question of liability submitted to you for decision are the following:

(1.) Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?

(2.) Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving the averments set forth in plaintiff's complaint. (No. 11; T.R. pp. 29-33.)

(e) (The first 5 paragraphs of this proposed instruction are in substance the same as the first 5 paragraphs of No. 11 and are not, therefore, set forth verbatim here; but by reference thereto, are incorporated herein.)

The issues of fact with respect to the foregoing averments of the complaint which have been denied in defendant's answer submitted to you for decision, are the following:

1. Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?

2. Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the said averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving any of the averments set forth in plaintiff's complaint and which are denied in the defendant's answer. (No. 11-A; T.R. pp. 33-37.)

(f) The mere fact that Nathanael Patrick Hutchison may have suffered personal injuries resulting in his death is not sufficient to entitle the plaintiff to recover any damages whatever even though Nathanael Patrick Hutchison may have been engaged in the course of his employment at the time he suffered such personal injury. There is no liability whatever on the part of the defendant in this case in the absence of proof of a negligent failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place in which to work and proof by a preponderance of substantial evidence that such, if any, failure on the part of the defendant proximately caused or proximately contributed to the personal injuries suffered by Nathanael Patrick Hutchison. (No. 12; T.R. pp. 37-38.)

(g) In your deliberations you are not permitted to determine what issues of fact are raised by the pleadings. Whether an issue of fact is or is not raised by the pleadings is a question of law and is within the sole province of the Court. (No. 13; T.R. p. 38.)

(h) The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course or performance of his duties or under the direction of an agent of the defendant or in furtherance of the interest of said de-

fendant at the time he suffered the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilating shaft in the course of any duty or employment; and also denies that there was any failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff. (No. 14; T.R. pp. 38-40.)

(i) The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course of his employment at the time he suffered the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilator shaft in the course of his employment; and also denies that there was any failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff. (No. 14-A; T.R. pp. 40-42.)

(j) Your specific attention is directed to the proposition that the plaintiff does not aver in her complaint

that any appliance in or about the ventilator shaft in masthouse No. 2 was defective. The only claim she makes in this respect is that the defendant did not supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In deciding whether the defendant is or is not liable in damages, you are instructed that with respect to this particular element of plaintiff's claim you are restricted to determining whether there were or were not sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. If you find from all of the evidence that the defendant did supply a safety appliance about the ventilator shaft in masthouse No. 2 and that said safety appliance was in itself sufficient to provide a reasonably safe place in which to work, it will be your duty to find defendant was not negligent in this respect. (No. 15-A; T.R. p. 43.)

(k) There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with *a* safety appliance about the ventilator shaft in masthouse No. 2. The averment or claim of the plaintiff in this respect, denied by the defendant, is that the defendant negligently failed and neglected to supply the deceased with *sufficient* safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work. Therefore the claim of the plaintiff in this respect is that the pipe railings surrounding the opening in the masthouse deck at the top of the ventilator shaft were not in themselves a reasonably sufficient safety appliance in and about said ventilator shaft to provide a reasonably safe place to work. If you find from all of the evidence that the pipe railings surrounding opening

at the top of the ventilator shaft was a safety appliance and that it, without anything more, was a reasonably adequate safety appliance and provided a seaman whose duties might require him to be in the masthouse in the performance of his duties with a condition of reasonable safety *in the event such seaman was exercising ordinary care for his own safety and preservation,* then you are instructed that no duty was imposed by law upon the defendant to provide *any other, different or additional safety appliance* in and about the said ventilator shaft. (No. 16-A; T.R. pp. 44-45.)

(l) In so far as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides, in so far as it may be applicable to the averments set forth in plaintiff's complaint, that the employer of a seaman shall be liable in damages in the event his death is proximately caused, or proximately contributed to, by reason of any insufficiency, due to to ship operator's negligence, in its safety appliances in and about the ventilator shaft located in masthouse No. 2. Thus, in order to prevail on the second claim, the plaintiff must prove by a preponderance of substantial evidence that there was actually an insufficiency in the defendant's safety appliances in and about said ventilator shaft; that such, if any, insufficiency was due in whole or in part to negligence on the part of the defendant and that the death of Nathanael Patrick Hutchison was proximately caused or proximately contributed to by such, if any, negligence. (No. 17; T.R. pp. 45-46.)

(m) The law imposed upon the defendant the duty of exercising ordinary care to supply reasonably ade-

quate safety appliances in and about the ventilator shaft located in masthouse No. 2 to provide a reasonably safe place to work, but this does not require the defendant to provide safety appliances which would have made the ventilator shaft reasonably safe for the use by or protection of *any* seaman *excepting one who in his reasonably necessary use of the masthouse in and about the ventilator shaft is exercising ordinary care for his own safety and preservation. There is no duty imposed by law upon a ship operator to provide sufficient safety appliances which might be necessary for the purpose of preserving the bodily safety or life of a seaman who in his use thereof does anything which an ordinarily prudent seaman would not do or fails to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances.* (No. 18; T.R. pp. 46-47.)

(n) Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. *While the foregoing definition of negligence is a general definition,* you are instructed that in *applying* this definition to the *question of liability,* if any, on the part of the *defendant* you are *restricted to the evidence,* if any, *with respect to the specific claim of negligence which the plaintiff avers in her complaint.* (No. 19; T.R. p. 47.)

(o) The proximate cause of an injury or death is a *negligent act or omission* which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury or death, and without which the result would not have occurred. *In this connection you are reminded of the proposition that the plaintiff*

does not aver in her complaint that the defendant committed any negligent act. (No. 23; T.R. pp. 48-49.)

(p) You are instructed that in the absence of evidence, direct or indirect, to the contrary, it is a presumption of law that the defendant in the pending case did not fail, negligently or otherwise, to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In the absence of evidence, direct or indirect, to the contrary your finding on this issue of fact must be in favor of the defendant. If you find in favor of the defendant on this particular issue of fact your verdict must be in favor of the defendant with respect to both of the claims asserted by her in her complaint. (No. 24; T.R. p. 49.)

(q) *You are not entitled to indulge in any presumption excepting those, if any, which the court in these instructions shall state is a deduction which the law expressly directs to be made from particular facts.* (No. 25; T.R. pp. 49-50.)

(r) Every finding which you make during your deliberations and which is used as a basis upon which you arrive at and render a verdict must be based upon direct or indirect evidence.

You are further instructed that you are not entitled to indulge in any presumption from direct or other evidence actually introduced into the record unless the court states to you specifically that you are entitled to indulge in some specific presumption or presumptions. While you are entitled to decide the credibility of a witness you are not entitled to add anything to the actual evidence which has been introduced. In other words, while you may, if you believe you are justified in doing so, disbelieve all or any part of the testimony of any

witness who has testified before you either by way of deposition or in person, you can not add anything to the testimony of any such witness. (No. 65; T.R. pp. 78-79.)

(s) One of the essential elements with reference to which the sole and exclusive burden of proof by a preponderance of evidence rests upon the plaintiff in this case is that at the precise time when Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died, the relationship of employer and employee existed between said Nathanael Patrick Hutchison and the defendant and that he was engaged in the course of his employment as such employee. In this connection, you are instructed that until a seaman signs shipping articles or makes some oral agreement with the Master of a vessel pursuant to which the seaman obligates himself to assume for some specific period of time the status of an employee and thus subject to the call of duty as a seaman, the seaman has a right to quit his job at any time he may see fit to do so. (No. 28; T.R. pp. 51-52.)

(t) You are instructed that regardless of the existence or non-existence of sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work there is no liability on the part of the defendant in this case unless the plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison actually suffered personal injury in the course of his employment. In this connection a seaman does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his con-

tract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison was actually in the course of his employment as a seaman at the very time he suffered personal injury, your verdict will be in favor of the defendant with respect to each of the claims set forth in plaintiff's complaint. (No. 30; T.R. pp. 52-53.)

(u) A seaman does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of evidence that Nathanael Patrick Hutchison was actually in the course of his employment as a seaman at the very time he suffered the personal injuries proximately caused at the time he struck the bottom of the ventilator shaft, you must find that the defendant is not liable for any damages by reason of conscious pain and suffering on the part of Nathanael Patrick Hutchison or by reason of a failure, if any, of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. (No. 30-A; T.R. pp. 53-54.)

(v) Your specific attention is directed to the proposition that there is no averment in the plaintiff's complaint charging that the personal injuries and death of

Nathanael Patrick Hutchison were or that either thereof was proximately caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to negligence on the part of defendant is her contention, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify the rendition of a verdict in favor of the plaintiff, she is required to prove by a preponderance of substantial evidence the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.
2. That such personal injury was suffered in the course of his employment.
3. That there was failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.
4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.
5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof. (No. 31; T.R. pp. 54-55.)

(w) You are instructed that there is no averment in the plaintiff's complaint charging that the personal injuries sustained at the time Nathanael Patrick Hutchison fell to the bottom of the ventilator shaft were proximately

caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to the injuries sustained by her deceased husband at said time is her claim, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify or support a finding in favor of the plaintiff upon the issue with respect to said claim, she is required to prove by a preponderance of substantial evidence, the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.
2. That such personal injury was suffered in the course of his employment.
3. That there was a failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.
4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.
5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof. (No. 31-A; T.R. pp. 55-56.)

(x) No omission may be considered negligent unless the danger of injury was reasonably foreseeable by the defendant, before the happening of the accident, in the exercise of that amount of care which would have been exercised by an ordinarily prudent employer under the

same or similar circumstances. It is of the essence of actionable negligence that the party charged should, in the exercise of ordinary care and caution, have knowledge that the omission complained of was such an omission as might, within the realm of probability, cause some injury to a seaman exercising ordinary care for his own safety. The circumstances necessary to be known before liability in consequence of an omission will be imposed must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof. (No. 32; T.R. pp. 56-57.)

(y) It is of the essence of actionable negligence that a preponderance of the evidence must show that the party charged should, in the exercise of ordinary care and caution, have anticipated that the omission complained of was such an omission as might cause some injury to a seaman exercising ordinary care for his own safety. The circumstances necessary to be known before liability, by reason of an omission, will be imposed, must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof. (No. 32-A; T.R. p. 57.)

(z) In order to warrant or support a finding that an omission is a proximate cause of an injury, injury at least in some form must be shown by a preponderance of the evidence to have been foreseeable by the defendant, in the exercise of ordinary prudence, in the light of the attending circumstances. (No. 35; T. R. p. 58.)

(aa) One test to be applied in deciding whether there was or was not a negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work is the following: Prior to the time that Nathanael Patrick Hutchison in some manner got

into the ventilator shaft and fell to the bottom thereof would an ordinarily prudent person operating the SS "Linfield Victory" have anticipated that the pipe railings surrounding the opening at the top of the ventilator shaft were not reasonably sufficient to protect a seaman exercising ordinary care of his own safety and in the full possession of normal faculties from inadverently falling into said ventilator shaft? If you answer this question in the negative, there was no negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. (No. 35-A; T.R. pp. 58-59.)

(bb) One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be substantial evidence justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew. (No. 36; T.R. p. 59.)

(cc) One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be evidence, direct or indirect, justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew. (No. 36-A; T.R. p. 59.)

(dd) It is sufficient if a safety appliance be such as is reasonably fit for its purpose and reasonably adequate for the purpose of preventing accidental injury to an employee who is exercising ordinary care for his own safety. (No. 33; T.R. pp. 57-58.)

(ee) It is not the absolute duty of an employer to furnish a safe place to work. The only obligation is that

the employer exercise reasonable care to provide a reasonably safe place in which to work. (No. 34; T.R. p. 58.)

(ff) You may not indulge in speculation, surmise or conjecture with respect to any of the matters or elements as to which the law places the burden of proof upon the plaintiff. (No. 38; T.R. p. 60.)

(gg) You are not permitted to speculate, conjecture or surmise with respect to when, how or in what manner Nathanael Patrick Hutchison sustained the injuries resulting in his death. (No. 39; T.R. p. 60.)

(hh) You are instructed that the pipe railings installed around the open sides of the ventilator shaft were supplied for the purpose of preventing any seaman, *while exercising ordinary care for his own safety,* from *inadvertently* falling into said ventilator shaft in the course of his employment, *and that said pipe railings constituted a safety appliance for that purpose.* If you find from the evidence the said pipe railings constituted all that a reasonably prudent employer would have furnished in the way of safety appliances in and about the ventilator shaft in order to provide a reasonably safe place to work, your finding with respect to said issue of fact must be in favor of the defendant. (No. 40-A; T.R. p. 61.)

(ii) The disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety cannot be used by you as a basis of a finding that the defendant failed or neglected to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. Therefore, in deciding whether the defendant did or did not fail or neglect to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work you are precluded from basing a finding with respect to that issue of fact directly or indirectly

upon the disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety. (No. 52; T.R. p. 67.)

(jj) The employer of a seaman is not an insurer or guarantor of his safety or life. The design and construction of an appliance is not required by law to be absolutely safe to the end that it is impossible for a seaman to be injured or to lose his life. (No. 42; T.R. pp. 61-62.)

(kk) A steamship operator is not guilty of actionable negligence in the event such operator merely fails to anticipate carelessness or lack of care upon the part of an employee who may suffer injury. (No. 43; T.R. p. 62.)

(ll) The defendant in this case has admitted that there was no permanent artificial lighting fixture installed in that part of masthouse No. 2 where the ventilator shaft referred to in the evidence was located. In this connection, you are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the inside of said masthouse was in a state of darkness and that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work. (No. 44; T.R. p. 62.)

(mm) You are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the actual visibility inside of said masthouse, at or immediately before Nathanael P. Hutchison fell, was such that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work. (No. 44-A; T.R. pp. 62-63.)

(nn) If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of the defendant with respect to each of plaintiff's claims. (No. 45; T.R. p. 63.)

(oo) If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of the defendant as to plaintiff's claim with respect to the place of work. (No. 45-A; T.R. pp. 63-64.)

(pp) There is a distinction between contributory negligence and negligence on the part of an employee which is the sole proximate cause of his injury or death. Contributory negligence is of importance in this case only if you find from all of the evidence that the defendant negligently failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work and that he suffered personal injury and death as a proximate result of such, if any, failure or

neglect. In such case, if you so find from the evidence, it is your duty to diminish the damages in proportion to the negligence, if any, on the part of Nathanael Patrick Hutchison proximately contributing to his own injury and death. On the other hand, if you find from all of the evidence that the sole proximate cause of the injury and death of Nathanael Patrick Hutchison was negligence on his part, then your verdict must be in favor of the defendant. (No. 46; T.R. p. 64.)

(qq) Nathanael Patrick Hutchison was required at all times to exercise that amount of care and caution which would have been exercised under the same or similar circumstances by an ordinarily prudent person to observe and avoid danger. In the absence of evidence, direct or indirect, to the contrary, the law presumes that he had notice of everything which an ordinarily careful seaman would have known under the same or similar circumstances. If Nathanael Patrick Hutchison did anything which an ordinarily prudent seaman would not have done under the same or similar circumstances or failed to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances then it will be your duty to find that Nathanael Patrick Hutchison was guilty of negligence. If you find that he was guilty of negligence and that such, if any, negligence was the sole proximate cause of personal injury and death, your verdict must be in favor of the defendant with respect to each claim asserted by the plaintiff. (No. 47; T.R. pp. 64-65.)

(rr) The law does not permit you to guess or speculate as to negligence or as to the proximate cause of the injuries or death of Nathanael Patrick Hutchison. If the evidence on the issue of claimed negligence on the part of the defendant or proximate cause does not preponder-

ate in favor of the plaintiff, then she has failed to fulfill her burden of proof. If after considering all of the evidence you find that it is just as probable that either the defendant was not negligent or that, if it was, its negligence was not a proximate cause of the injuries or death, as it is that some negligence on its part was such a cause, then a case against the defendant has not been established. (No. 49; T.R. pp. 65-66.)

(ss) In determining whether negligence or proximate cause or contributory negligence has been proved by a preponderance of evidence, you must consider all of the evidence, direct or indirect, bearing either way upon the question, regardless of which party produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. (No. 51; T.R. p. 66.)

(tt) There was no duty on the part of the defendant to anticipate or provide against a negligent, careless or improper use of any safety appliance or a failure on the part of any seaman to exercise ordinary care in or about the use of any safety appliance actually installed about the ventilator shaft. (No. 54; T.R. p. 68.)

(uu) In the instructions which have been given to you and in some which may be given to you the phrase "reasonably safe" is used. A safety appliance is reasonably sufficient in the event it is one which in and of itself would be deemed adequate by an ordinarily prudent employer under the same or similar circumstances. (No. 56; T.R. pp. 69-70.)

(vv) An appliance is reasonably safe when it furnishes such safeguards to life and limb as would be provided by an ordinarily prudent employer under the same or similar circumstances. In other words, a safety appliance is reasonably sufficient if in and of itself it is all

that an ordinarily prudent employer of seamen would supply for the purpose of safeguarding a ventilator shaft located inside a masthouse of a vessel under circumstances the same as or similar to those shown by the evidence in this case. (No. 57-A; T.R. p. 70.)

(ww) You are instructed that the "Linfield Victory" was owned by the United States of America, Department of Commerce, and that it was a "steam vessel". An applicable statute enacted by the Congress, in full force and effect in so far as this case is concerned, provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each such steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life.

The applicable statute enacted by Congress also provided that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, before the chief officer of the customs of the district or any other person competent by law to administer oaths. Said statute also provided that such certificate shall be delivered to the master or owner of the vessel to which it relates, and one copy thereof shall be kept on file in the Coast Guard official's office and one copy thereof delivered to the collector or other chief officer of the customs of the district in which such inspection has been made, who shall keep the same on file in his office. The statute also provided that no vessel required to be inspected under the provisions of said statute shall be navigated without having on board an unexpired regular certificate of inspection.

You are instructed that it is a presumption of law, in the absence of evidence to the contrary, that there was on board the "Linfield Victory" at all times referred to in the evidence in this case, an unexpired regular certificate of inspection and that such certificate of inspection had been issued by the Coast Guard and that all duties imposed by law upon the Coast Guard with reference to the inspection of said "Linfield Victory" had been regularly performed and that the Coast Guard obeyed the requirements of said statute. Unless this presumption has been controverted by other evidence, direct or indirect, you are bound to find according to such presumption. (No. 58-A; T.R. pp. 73-74.)

(xx) You are instructed that regardless of the fact that the "Linfield Victory" was moored to or tied up at a dock at Baltimore, Maryland, on April 24, 1951, the said vessel was in navigation. (No. 59; T.R. pp. 74-75.)

(yy) You are instructed that regardless of the fact that the "Linfield Victory" was moored or tied to a dock at Baltimore, Maryland, on April 24, 1951, said "Linfield Victory" was at said time being used in navigation as a steamer; and it is a presumption of law in accordance with which you are bound to find, unless controverted by other evidence, direct or indirect, that the Coast Guard had carefully inspected the hull of said vessel and had satisfied itself that said vessel was of a structure suitable for the service in which she was to be employed and was in a condition to warrant the belief that she might be used in navigation with safety to life and that all requirements of law were faithfully complied with and that it did not find on board said vessel, as part of the required equipment thereof, any equipment, apparatus or appliances not conforming to the requirements of law. (No. 60; T.R. p. 76.)

(zz) You are instructed that there is no obligation resting upon the defendant in this case to produce either in person or by deposition the testimony of any person who may have been aboard the vessel SS "Linfield Victory" at any time while the said vessel was in the Port of Baltimore, Maryland, for any purpose whatever. You are not entitled to presume or infer that if the defendant had produced, either in person or by deposition, the testimony of any person who may have been aboard the vessel "Linfield Victory" while it was in the Port of Baltimore, Maryland, or any other person who was in the City of Baltimore, Maryland, at any time while the said vessel was at that port that such testimony would constitute any evidence whatever in favor of the plaintiff's claim that the defendant failed to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work or that the life of Nathanael Patrick Hutchison could have been saved by a surgical operation or any other kind of medical care and attention. (No. 66; T.R. pp. 80-81.)

Appellant's objections to the instructions given and refused are in four sections. The first section refers to what occurred on the morning of October 13, 1955, before the court had given any of its instructions to the jury; the second section refers to what occurred immediately after the court concluded its first effort to instruct the jury; the third has reference to amendments before the jury started its deliberations; and the fourth section refers to what occurred when the jury came back to the court room, of its own volition, in an obviously confused, rebellious and sympathetic state of mind.

First section: On Thursday morning, October 13, 1955 (the court instructed the jury the next day, October 14, 1955) the record shows the following:

"Mr. Gallagher. In an effort to be helpful to the court, I will state now that I see no reason whatever why the court should not be able to state to the jury all of the law applicable to this case orally, without reading any instruction proposed by either of the parties. And the court will do that if the court will keep in mind the essential bases of actionable negligence.

No. 1. What duty is imposed by law upon the defendant Pacific-Atlantic Steamship Co. with reference to the allegations in the first amended complaint.

In other words, directed to those averments of the first amended complaint.

No. 2. After stating the legal duty, for example, your Honor should tell the jury what legal duty was imposed upon the defendant and upon what agent of the defendant to provide proper medical care for Mr. Hutchison.

I think the only agent of the defendant who could be charged with the performance of that duty, if it arose at all, was the master of the vessel.

Next, your Honor should tell the jury what the issues of fact are, as raised by the pleadings. Those issues are simple. There is a specific allegation with reference to alleged negligence, in a failure or neglect to supply sufficient safety appliances in and about the ventilator shaft and in masthouse No. 2, to provide a reasonably safe place to work.

Next, as the plaintiff claims—*in making these suggestions I am not agreeing these issues should be submitted to the jury.* Next, she claims that as a proximate result of the same alleged negligence, in the omission to do a certain thing with reference to safety appliances, Nathanael Patrick Hutchison, during his lifetime, suffered conscious pain and suffering.

Now, as a corollary, counsel says he also claims that a failure to conduct a search was negligence. I don't know

what your Honor is going to do with that, but I think you have got to tell the jury that there was or was not a legal duty to search for him simply and solely because of the fact that he didn't show up for work. I don't think there was any such legal duty.

Then your Honor will have to instruct the jury about what constitutes negligence on the part of the deceased.

In other words, tell the jury with reference to him, and referring to him, that negligence is the doing of something which an ordinarily prudent seaman would not have done, or the failure to do something which an ordinarily prudent seaman would have done, under the same or similar circumstances.

And that if he was so guilty of negligence, and it was the sole proximate cause of his injury, then, with reference to the claims for conscious pain and suffering, and with reference to the damages for death there is no cause of action and the verdict would have to be for the defendant.

However, if the jury finds, in response to your other instructions, the defendant did negligently breach some duty it owed to Mr. Hutchison or to Mrs. Hutchison, and that as a proximate result thereof his death occurred, and so forth, and he was guilty of contributory negligence, then the jury would have to diminish the damages in accordance with the percentage with respect to which his negligence proximately contributed to his injuries.

I don't think your Honor should have any trouble with injuries, with reference to the measure of damage, if they are couched in language which does not convey to the jury the idea that your Honor is assuming that the lady is entitled to recover any damage.

Now, there are other subjects that your Honor, I suggest, should cover clearly. No. 1. The statutes of the United States impose certain specific duties upon the

Coast Guard with reference to the inspection of vessels. I have called the statutes to your Honor's attention.

I think you should instruct the jury that the law required the Coast Guard to do thus and so, insofar as the statute is applicable to safety of life and so forth.

And that your Honor should tell the jury that in the absence of evidence, direct or indirect, to the contrary, the jury must find in accordance with the presumption that the Coast Guard performed its full, official duty in that respect before issuing a certificate of inspection.

I think that your Honor should also cover this question of illumination in the masthouse, to tell the jury that unless the plaintiff has proved that the inside of the masthouse on the date and at the time when Mr. Hutchison got into this ventilator shaft was so lacking in visibility as to make it necessary to have artificial illumination, and that unless the plaintiff has proved that they will disregard all of this testimony about no permanently affixed electrical fixtures.

Now, there is one other thing that I should call to your Honor's attention. I don't believe that your Honor should give the jury a general definition of negligence, because that would permit the jury to wander throughout the length and breadth of negligence generally, and they would not be confined to the averments of the complaint setting forth Mrs. Hutchison's specific claims of negligence, as denied by the answer.

And there is a case—there are a lot of cases, but there is one in 216 Fed. (2d) which holds that it is the duty of a United States District Judge to confine instructions, with reference to negligence, to the specific allegations which are set forth in the complaint, and not give some general definition of negligence which would permit the jury to say, "Oh, well, I think the president of the corporation should have been in Baltimore and I think the

defendant corporation should have had somebody leading this man around by the hand all day," and they didn't have one leading him around by the hand and therefore, they are guilty of negligence and so forth.

That is why I think that these instructions should be restricted to the issues raised by the allegations of the complaint and denied by the defendant.

The Court. They will be.

Mr. Gallagher. Now, one other thing. The only possible causes of action which this plaintiff might have are strictly and exclusively statutory. And those causes of action are separate and distinct and, therefore, there must be a separate verdict as to each cause of action.

The Court. There will be.

In fact, I have decided that, generally speaking, the interrogatories I worked out at the earlier trial were a good idea. Many of the suggestions of the interrogatories you proposed here are good, but they have become lengthy before you finished with them, so I will stay down this evening and work out a set of interrogatories which will require this jury to state whether they find negligence, whether they find contributory negligence, or whether they find proximate cause, whether they find conscious pain and suffering, and if they do so find it, what they allow for it.

Mr. Gallagher. I have asked for one, your Honor, which this jury can't answer, but it is a material issue in the case. What date and what time on what date did Nathanael Patrick Hutchison hit the bottom of that ventilator shaft and suffer his injuries?

If the jury can't answer that question, they can't say there was any negligence in failing to find him or failing to send him to a doctor, and they can't say that he suffered them in the course of his employment, in the absence of their ability to make that kind of a finding.

See, your Honor, there is no evidence in this case showing how this man was dressed when he was found. Was he in dress clothes, was he in working clothes? (R.T. pp. 602-607; T.R. pp. 358-363.)

The foregoing suggestions and contentions of defendant's attorney were thus called to the attention of the court before the jury retired to consider its verdict and constitute objections to the charge as actually given.

Second section:

(a) Mr. Gallagher. I except to the instruction wherein the court told the jury that the fact that the United States has or had an interest in the vessel LINFIELD VICTORY does not affect the responsibility of the defendant upon the following grounds:

No. 1—

The Court. I don't care what grounds you state. I am going to let the charge in that respect stand, in view of my research on it and in view of the argument which we have heretofore had.

Your exception is sufficient for the purpose of this court.

Mr. Gallagher. I respectfully request permission to state it for the benefit of the United States Court of Appeals.

The Court. They will know what you are getting at. (R.T. p. 799; T.R. pp. 529-530.)

(b) Mr. Gallagher. I except to the instruction given by the court that the operators of the LINFIELD VICTORY are responsible for the physical structure of the ship and have placed upon them any burden to change the physical structure of the ship upon the ground that the charter party prohibits it, without the consent and permission of the Government, the owner. (R.T. pp. 799-800; T.R. p. 530.)

(c) Mr. Gallagher. I except to the giving of the instruction with reference to presumptions, because the

court has not told the jury that they are not entitled to indulge in any presumptions excepting those specifically referred to by the court. (R.T. p. 800; T.R. pp. 530-531.)

(d) Mr. Gallagher. I except to the instruction given by the court that any party who intends to deny the effect of a presumption must present evidence to the contrary. (R.T. p. 800; T.R. p. 531.)

(e) Mr. Gallagher. I except to the instruction that the court gave to the jury with reference to the Certificate of Inspection, which has been introduced in evidence, wherein the court instructed with reference to questions of fact and deprived the defendant of its right to a jury trial. (R.T. p. 801; T.R. p. 532.)

(f) Mr. Gallagher. I except to the instruction with reference to your Honor's discourse on the Certificate of Inspection for another reason, that it ignores the testimony of the witness Dyer as to the extent of the inspection, and it ignores the presumption that official duty has been performed and that it is in itself evidence, because it is a disputable presumption, and the jury must find in accordance with it, in the absence of evidence direct or indirect, to the contrary. (R.T. p. 801; T.R. p. 532.)

(g) Mr. Gallagher. I except to the instructions given by the court for the reason that the court did not state to the jury the issues, the specific issues as raised by the pleadings and state to the jury that their consideration of the evidence is to be restricted to those specific averments of alleged negligence. (R.T. p. 802; T.R. p. 532.)

(h) Mr. Gallagher. I except to the instructions, the part of the instruction as follows:

"In the absence of knowledge or notice to the contrary and in the absence of circumstances that caution or would

caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and may rely and act upon that assumption'' upon the ground that everything connected with the masthouse and the shafts, and so forth, was plainly obvious and there is no basis in the evidence for that instruction. (R.T. pp. 802-803; T.R. p. 533.)

(i) Mr. Gallagher. I take exception to the instruction that the fact that Nathanael Patrick Hutchison had not signed Articles at the time of receiving the personal injuries in no way deprives him of his right under the law, upon the ground that that instruction assumes as a fact that he had some right under the law. In other words, to collect damages.

The Court. Exception noted.

Mr. Gallagher. And the same exception is taken to the instructions given by the court with reference to Mrs. Hutchison's rights under the law. (R.T. p. 803; T.R. p. 833.)

(j) Mr. Gallagher. I except to the instruction of the court, ''That in the event of injury Nathanael Patrick Hutchison was entitled to the rights which the court has referred to and will refer to in these instructions, unless he had actually left such employment, and whether or not he commenced employment or whether or not he left the employment are questions that are exclusively for the jury,'' upon the ground that that instruction calls the jury's attention to the assumption that Nathanael Patrick Hutchison had a legal right to recover.

The Court. I think he did, whether he was a member of the crew or not, if he were an invitee or even a licensee. (R.T. pp. 803-804; T.R. p. 534.)

(k) Mr. Gallagher. I except to the instructions of the court wherein the court defines negligence generally,

wherein the court refers to acts or omissions with reference to the defendant, upon the ground that the court has thereby expanded the issues and has not confined the jury to a consideration of specific alleged failures, which do not include any acts on the part of the defendant or its employees. (R.T. p. 804; T.R. p. 534.)

(l) Mr. Gallagher. I except to the instruction that negligence is the doing of some act which a reasonably prudent person would not do or the failure to do some act which a reasonably prudent person would do,—

The Court. Oh, that is Blackstone, Chitty and all the other people—

Mr. Gallagher. May I finish my exception, your Honor?

The Court. I read it from BAJI.

Mr. Gallagher. —upon the ground that the allegation so far as the defendant is concerned, relates solely to alleged omissions.

And unless the court says that that applies to Mr. Hutchison, but that only evidence which may show alleged omissions applies to the defendant, the instruction is prejudicial. (R.T. pp. 805-806; T.R. pp. 535-536.)

(m) Mr. Gallagher. I take exception to the remaining instructions which refer generally to negligence, without confining it to the particular and specific acts (sic) of alleged omissions set forth in the complaint, so far as the defendant is concerned. (R.T. p. 806; T.R. p. 536.)

(n) I except to the instruction given by your Honor with reference to the increase or decrease in the amount of care which must be exercised, because the court pointed that at the defendant and did not say that Nathanael Patrick Hutchison was required to do the same thing. (R.T. p. 806; T.R. p. 536.)

(o) Mr. Gallagher. I take exception to the instruction given by the court with reference to contributory

negligence, wherein the court told the jury that the only thing it could think of was the testimony with reference to the fact that he felt rugged and might have a slight hangover, upon the ground that that is an instruction with reference to fact which deprives the defendant of a right to a jury trial.

The Court. What other possible basis for contributory negligence is suggested by the evidence? Tell me and I will amend my comment to the jury.

Mr. Gallagher. If the man climbed over the pipe railings, in the full possession of his faculties, at a time when he could see what he was doing, then he was guilty of gross negligence, and such negligence would be the sole proximate cause of his injury and would, at least, be a proximate cause to a great extent.

He could have climbed up the escape shaft, as plaintiff claims, in utter darkness. If he did so he was guilty of gross negligence which would proximately contribute to his injuries, and so forth.

Those are not the only things he could have done or omitted. And I say that the court cannot tell the jury what is the extent of contributory negligence or what facts they can consider in determining that issue.

The Court. I can comment on the evidence.

Mr. Gallagher. I contend it is a violation of our constitutional right to a jury trial. (R.T. pp. 806-807; T.R. p. 536.)

(p) Now, I take exception to the instruction given by your Honor, where you told the jury that at the very time he suffered his personal injuries he was actively engaged in the course of his employment, or was in the course of his employment. (R.T. p. 807; T.R. p. 537.)

(q) Mr. Gallagher. I take exception to the instruction given by your Honor to the jury, wherein you stated specifically that it didn't make a particle of difference

what time this alleged accident occurred, for the reason that the course of the employment is a very essential issue here and the time is, therefore, of material importance and it is the burden of the plaintiff to prove that the injuries were suffered in the course of the employment and the time is a very material element in determining that factor. (R.T. p. 808; T.R. pp. 537-538.)

(r) Mr. Gallagher. I except to the refusal of the court to submit to the jury an interrogatory requesting the jury to state on what date Nathanael Patrick Hutchison suffered his injuries and at what time on such date. (R.T. p. 808; T.R. p. 533.)

(s) Mr. Gallagher. If your Honor please, the defendant takes exception to the refusal of the court to give its proposed Instruction No. 11 upon the ground that the matters covered by that instruction have not been covered by the instruction given.

The Court. Will you pass it up, please?

These go from 8 to—that is a hiatus; from 8 to 23.

Read me enough of 11, Mr. Gallagher, that I will have it recalled to my mind.

Mr. Gallagher. Your Honor, the subject of 11 is to set forth the issues of fact which the court is submitting to the jury, with reference to the claim of actionable negligence, and also tells the jury that there is no burden on the defendant to offer any evidence whatever for the purpose of disproving the averments set forth in Plaintiff's Complaint, and that the averments of Plaintiff's Complaint do not constitute the slightest evidence. Those have not been covered by the instructions given. (R.T. pp. 809-810; T.R. pp. 539-540.)

(t) Mr. Gallagher. I take exception to the refusal to give defendant's proposed Instruction No. 11-A for the same reasons which I have referred to with respect to defendant's proposed Instruction 11. (R.T. p. 810; T.R. p. 540.)

(u) Mr. Gallagher. I take exception to the refusal to give proposed Instruction No. 13, which would have told the jury that they are not permitted to determine what issues of fact are raised by the pleadings. (R.T. p. 810; T.R. p. 540.)

(v) The Court. They haven't seen the pleadings in this case, nor will they. I read them the charging language.

Mr. Gallagher. I except to the refusal of the court to give defendant's proposed Instruction No. 14-A, which—

The Court. What are the first words of it?

Mr. Gallagher. "The court will call to your attention certain specific averments set forth by the plaintiff in her Complaint."

The Court. All right, that is enough. Denied; noted. (R.T. p. 811; T.R. p. 540.)

(w) Mr. Gallagher. I except to the refusal of the court to give defendant's proposed Instruction No. 15, which would have told the jury that there is no claim of the plaintiff to the effect that any appliance in the masthouse was defective and points out the specific claim which she does make. (R.T. p. 811; T.R. p. 540.)

(x) Mr. Gallagher. I except to the refusal of the court to give defendant's proposed Instruction No. 15-A for the same reasons stated with respect to the refusal to give No. 15. (R.T. p. 811; T.R. p. 541.)

(y) Mr. Gallagher. I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 16-A upon the ground that the principles of law set forth therein have not been covered by the instructions given by the court.

The Court. Will you read me the first words of 16-A?

Mr. Gallagher. "There is no averment set forth in plaintiff's complaint that the defendant negligently or

otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2."

The Court. Noted and denied. When I said "noted" I mean it is noted for your purpose on appeal.

When I say "denied", I mean I refuse to read it to the jury now, for all reasons which are legally applicable to such refusal. (R.T. pp. 811-812; T.R. p. 541.)

(z) Mr. Gallagher. I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 17 upon the ground that it states principles of law, which have not been covered, and as to which the defendant is entitled to have the jury instructed.

The Court. The first words, please.

Mr. Gallagher. "Insofar as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides,—"

The Court. Denied. Noted and denied. It is covered by other instructions. (R.T. p. 812; T.R. pp. 541-542.)

(aa) Mr. Gallagher. I respectfully except to the court's refusal to give defendant's proposed Instruction No. 18 upon the same grounds and each of them heretofore stated. (R.T. p. 813; T.R. p. 542.)

(bb) Mr. Gallagher. I except to the refusal of the court to give defendant's proposed Instruction No. 66, which has to do with the—

The Court. All right. I think I have that one here. It was filed in sequence.

Mr. Gallagher. In the light of the argument made by Mr. Simpson to the jury, that it was our obligation to bring in some witnesses, the refusal to give that instruction is particularly prejudicial. (R.T. p. 813; T.R. p. 542.)

(cc) Mr. Gallagher. The defendant respectfully excepts to the refusal of the court to instruct the jury

with reference to what would constitute negligence on the part of the deceased himself. (R.T. p. 813; T.R. p. 542.)

(dd) Mr. Gallagher. The defendant respectfully excepts to the refusal of the court to instruct as requested in No. 28, that a seaman has a right, under certain circumstances, to quit his job at any time he may see fit to do so. (R.T. p. 813; T.R. pp. 542-543.)

(ee) Mr. Gallagher. I take exception to the refusal of the court to give proposed Instruction No. 30-A upon the ground that that would tell the jury what is actually within the—an act within the course of employment and would restrict the jury to the proposition that if the plaintiff doesn't prove that particular element by a preponderance of evidence that she could not claim that there was any failure to furnish a reasonably safe place to work, or that he was actually engaged in the course of his employment. (R.T. p. 814; T.R. p. 543.)

* * * * * *

The Court. Read enough of it that I can see if it has legal vice in it.

Mr. Gallagher. "A seaman does not suffer a personal injury in the course of his employment, unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer, or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment."

The Court. Covered by instructions given. Noted and denied. (R.T. p. 815; T.R. p. 544.)

(ff) Mr. Gallagher. I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 31, or in lieu thereof 31-A, which has to do—

The Court. Just a moment, until I find it here. Noted and denied.

Mr. Gallagher. I respectfully except to the refusal of the court to give the proposed defendant's instructions with reference to foreseeability as being one of the essential elements of actionable negligence. In other words, Nos. 32, 32-A, 33, 34, 35, 35-A, 36, 36-A and—that is it. 36-A is the last one. Upon the ground that your Honor has not fully or correctly instructed the jury with reference to foreseeability. (R.T. pp. 815-816; T.R. p. 544.)

(gg) Mr. Gallagher. I respectfully except to the refusal of the court to instruct the jury, as requested by the defendant, that the pipe railings surrounding the ventilator shaft were, as a matter of law, a safety appliance. (R.T. p. 816; T.R. p. 545.)

(hh) Mr. Gallagher. I respectfully except to the refusal of the court to instruct the jury that there was no duty on the part of the defendant to furnish an appliance which would be reasonably safe for any seaman, unless such seaman was exercising ordinary care for his own safety and preservation, in the use thereof, or in the vicinity thereof. (R.T. p. 816; T.R. p. 545.)

(ii) Mr. Gallagher. I respectfully take an exception to the refusal of the court to instruct the jury in accordance with defendant's proposed Instruction No. 52, to the effect that from the disputable presumption favoring Mr. Hutchison the jury could not infer or presume any negligence on the part of the defendant. (R.T. p. 816; T.R. p. 545.)

(jj) Mr. Gallagher. I except to the refusal of the court to instruct the jury that the law did not impose upon a defendant an absolute duty of furnishing an accident-proof ventilator shaft, or that the masthouse had to be absolutely safe, to the end that it was impossible for a seaman to be injured. (R.T. pp. 816-817; T.R. p. 545.)

(kk) Mr. Gallagher. I respectfully except to the refusal of the court to give the defendant's proposed instruction to the effect that the defendant isn't guilty of actionable negligence merely because it fails to anticipate carelessness or lack of care upon the part of an employee. (R.T. p. 817; T.R. pp. 545-546.)

(ll) Now, Mr. Gallagher, you are going through, apparently all of your instructions and taking time to enumerate things we have been over before.

You have gone substantially past the time and it looks as if you carry on the way you are, you are going to take the full hour that you told me you were going to take.

Mr. Gallagher. We can shorten it.

The Court. *You are not going to run this courtroom.* Proceed rapidly, expeditiously.

Mr. Gallagher. May I do it this way, your Honor, in an effort to conserve time: If your Honor will state that in giving the instructions, which you have given, you had in mind all of the defendant's proposed instructions, and that anything which your Honor's instructions do not cover, which may be covered in the defendant's proposed, you intended to not give, then I can say, "May I have a general exception upon the ground that the court committed error in refusing to give those parts of the defendant's proposed instructions which cover matters not covered by the instructions given by the court"?

The Court. A general exception is noted.

Mr. Gallagher. That is satisfactory to your Honor?

The Court. Yes.

Mr. Gallagher. Your Honor doesn't call upon me to point out the specific defects that I claim exist?

The Court. I do not. (R.T. pp. 817-818; T.R. pp. 545-547.)

Third section:

(a) Now, as to exceptions to the further statement of the court to the jury, after they have returned following the statement of original exceptions, approach the bench, if there are any.

(Whereupon, the following procedings were had in the presence but out of the hearing of the jury:)

The Court. You don't have to re-state them all over again, but just what I said, did I say anything wrong?

Mr. Simpson. No exception, your Honor.

Mr. Gallagher. The defendant has no exception to what your Honor has stated here, but does not withdraw the exceptions which it has already stated and is not satisfied with the instructions, as a whole, at this time. (R.T. p. 822; T.R. p. 550.)

Fourth section:

(a) Mr. Gallagher. Your Honor, may I point out that under the Federal Rules of Civil Procedure, while it is permissible to say "first cause of action, second cause of action" and so forth, there are cases which hold that if you set forth separate claims in separate paragraphs that is all that is required.

Of course, you have got to allege a fact showing some proximate causal connection between what you do allege and what you do claim.

Assuming, without conceding, there are inferred facts sufficient to show plaintiff is entitled to relief on the theory that this was a negligent failure to search for him, and that such negligent failure proximately contributed to his death. That would be separate and distinct entirely from the cause of action which is predicated upon the condition of the masthouse appliances.

Therefore, as I have contended and do now contend, if the Court submits that theory to the jury, which I don't think the Court should, the Court must submit separate forms of verdict and have them labeled so we will know what the jury has done. Otherwise, the defendant would

be deprived of its property without due process of law, in that there is no finding with reference to that particular alleged cause of action. (R.T. pp. 849-850; T.R. pp. 568-569.)

(b) The defendant excepts to the instructions which your Honor has given to the jury since they came down this evening upon the ground that these instructions given to the jury are argumentative. They are not confined to the statement of principles of law applicable to the case.

They do not cover the issues which the Court purported to state to the jury. The Court refers to negligence and so forth and so on, but they are, I think, unfair to the defendant.

The Court keeps constantly referring to the fact that this poor widow has lost her husband and she has sustained a monetary loss, and so forth and so on. (R.T. p. 851; T.R. pp. 569-570.)

(c) Mr. Gallagher. Now, this question reads as follows:

> "Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?"

Now, I respectfully submit that that question should be answered categorically. The answer is either yes or no.

The question should be read to the jury and the answer given. I think the only possible answer that you should give to that interrogatory is yes. *And they should be instructed to disregard what you have said.*

The Court. I will not instruct them to disregard anything I have said. It has all been the law. (R.T. pp. 852-853; T.R. p. 571.)

35. The Court erred in refusing to submit to the jury a separate and distinct verdict form with respect to the averments in paragraph IX of the first amended complaint or special interrogatories with respect to said averments,

particularly in view of the fact that after the trial judge had erroneously permitted the plaintiff to introduce evidence on the subject of the failure to search for and discover Hutchison, had instructed the jury thereon, and had permitted this extraneous matter to soak into and prejudicially influence the minds of the jurors, he belatedly stated, at almost 11:00 p.m. on the last day of the trial, after the jurors had been deliberating since 1:00 p.m. of said date, that the averments of said paragraph IX were "thrown in, so far as reading the complaint is concerned, as kind of a gratuitous observation that they were a callous employer" and "it is not alleged any damages flowed from the failure to find him." (R.T. pp. 843-851; T.R. pp. 562-567.) The record affirmatively shows that at least some of the jurors were rebellious to the extent that they wanted to base a verdict on the death claim upon the evidence with respect to the failure to search for and discover Hutchison before he died. (R.T. p. 843; T.R. p. 562.)

IV.

ARGUMENT.

(a) THE COURT ERRED IN ITS ORDERS, DECISIONS, ACTIONS AND RULINGS WITH RESPECT TO IMMATERIAL AND IMPERTINENT MATTER CONSISTING OF THE AVERMENTS IN PARAGRAPH IX, FIRST AMENDED COMPLAINT; THERE WAS PREJUDICIAL IRREGULARITY IN THE PROCEEDINGS, ACTS AND CONDUCT OF THE COURT, JURY AND APPELLEE'S ATTORNEY IN CONNECTION THEREWITH; AND APPELLEE'S ATTORNEYS WERE, AND EACH THEREOF WAS, GUILTY OF PREJUDICIAL MISCONDUCT IN RESPECT THEREOF.

The assigned errors involved here are: 1, 2, 3, 4, 6, 13, 20, 31 and 35.

Said assignments are, and each thereof is, by reference thereto incorporated herein as part of appellant's argument in support thereof.

1. Approximately three years before the last trial, on October 10, 1952, appellant filed its written motion to strike paragraph IX from the pleading. (T.R. pp. 8-9.) By reference thereto, appellant incorporates herein the said written motion in its entirety; and by said incorporation adopts as part of its argument on appeal the contents thereof.

2. At the close of the evidence offered by the appellee, appellant orally moved to exclude from the consideration of the jury, in any event, the issue raised by the averments of paragraph IX. (R.T. pp. 398-399; T.R. pp. 297-298.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

3. At the close of the evidence offered by the appellee, appellant orally moved to dismiss paragraph IX upon the ground that it does not aver facts sufficient to show that the plaintiff is entitled to relief. (R.T. pp. 411-415; T.R. pp. 304-305.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

4. At the close of the evidence offered by the appellee, appellant orally moved for a directed verdict with respect to the averments of paragraph IX. (R.T. pp. 411-415; T.R. pp. 304-308.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

5. At the close of all the evidence, appellant orally moved to strike Crawford's testimony with respect to the subject matter averred in paragraph IX. (R.T. pp. 575-

576; T.R. p. 336.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

6. At the close of all the evidence, appellant orally moved for a directed verdict with respect to the "claim" set forth in paragraph IX. (R.T. pp. 576-577; T.R. pp. 336-337; R.T. pp. 581-586; T.R. pp. 336-346.) Said oral motion and the grounds and arguments in support thereof are, and each thereof is, by reference thereto incorporated herein; and by said incorporation appellant adopts all thereof as part of its argument on appeal.

7. When it was made to affirmatively appear, during the deliberations of the jury, that at least some of them wanted to base a verdict against appellant upon the subject matter of paragraph IX, appellant orally moved that the Court submit a separate form of verdict and/or special interrogatories in respect of the subject matter of paragraph IX. By reference thereto, appellant incorporates herein the following oral proceedings: (R.T. pp. 845-847; T.R. pp. 564-567; R.T. pp. 849-851; T.R. pp. 567-569) and by said incorporation adopts as part of its argument on appeal the contents thereof.

(a-1) The court committed prejudicial error in denying the written motion to strike paragraph IX.

It is an absolute certainty that an actual failure, negligent or otherwise, to search for and discover N. P. Hutchison in the bottom of the ventilator shaft could not have proximately caused or proximately contributed to the personal injuries, characterized as "devastating and permanent", suffered at the time he came in contact with the bottom of said shaft. It is also elementary that negligence is immaterial and impertinent unless it proximately causes

or proximately contributes to injury and damage. (*Brady v. Southern Ry. Co.,* 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239; *A. T. & S. F. Ry. Co. v. Saxon,* 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397.)

If, which it does not, paragraph IX contained averments showing the existence of the element of proximate causal connection, thus showing *actionable* negligence, *provided* it survived the death, this would be a subsequent and distinct tort which would have to be pleaded. (*Union Oil Co. of California v. Hunt,* 111 F.2d 269-277.) Appellant is *not* assuming or conceding, by the foregoing, that the subject matter of paragraph IX is or could be a right of action given by any part or portion of Chapter 2, F.E.L.A., or survives pursuant to § 59, 45 U.S.C. Appellant contends to the contrary.

Rule 8, F.R.C.P. provides that each averment of a pleading which sets forth a claim for relief "shall be simple, concise and direct"; the sum total of which must result in "a short and plain statement of the claim showing that the pleader *is* entitled to relief." The matter averred in paragraph IX does not meet this simple test. It is obviously immaterial and impertinent to the right of action for damages by reason of conscious pain and suffering given by §§ 1 and 9, Chapter 2, F.E.L.A., 45 U.S.C., §§ 51, 59. It is also impertinent and immaterial to the right of action for damages by reason of death. Therefore, the motion to strike the same from the pleading pursuant to Rule 12(f), F.R.C.P., should have been granted.

(a-2) The remaining assigned errors in respect of this subject are inter-related and are therefore properly presented together.

With presumed knowledge of the elementary principle of torts that a negligent act or omission is not actionable unless such act or omission proximately causes damage,

appellee's attorneys *wrongfully* inserted in the first amended complaint the averment "That defendant * * * and its employees were further negligent in failing to search for and discover (N. P. Hutchison) in *said injured condition* until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, State of Pennsylvania." (Par. IX, First Amended Complaint, T.R. p. 6.) They deliberately, craftily and cunningly omitted an averment that the alleged negligence proximately caused or contributed to any personal injury or to any conscious pain and suffering or to the death of N. P. Hutchison. Why did they omit, in this respect, the averments of proximate causal connection which they were so careful to include with respect to the original injuries and the death? Was it because they knew that the *non-statutory* general maritime law right of action available to a *living* seaman arising out of a *negligent* failure of the *master of a vessel* to provide all reasonably required and available medical, surgical and hospital care to a seaman who has *theretofore* suffered serious injury *while actually engaged in the service of the ship* is based upon a tort which is *entirely distinct and subsequent in time and nature with* respect to a tort, if any, which proximately caused the *original* injuries? Or was it because they were fearful of the proposition that if they averred facts showing such proximate causal connection, the trial court would be compelled—if it was of the opinion that such *non-statutory* right of action survived the death; or that it could be the basis of a verdict in favor of appellee on the claim arising out of the death—to submit separate forms of verdict with respect thereto? If this had been done a jury might, if instructed that it *could* do so, have returned two verdicts in favor of the appellant on the basis of a finding that there was no negligent failure to supply sufficient safety appliances in

and about the ventilator shaft to provide a reasonably safe place in which to work; and two verdicts against the appellant on the "negligent failure to search for and discover" theory. If this had been the result, the "fat would be in the fire" unless the latter theory is based upon a *statutory* right of action, *given* by Chapter 2, F.E.L.A. (45 U.S.C., § 59.)

The record demonstrates that the appellee had no evidence which would make out a *prima facie* case of actionable negligence, statutory or otherwise, on the theory that a negligent failure to search for and discover N. P. Hutchison while he was alive proximately caused or proximately contributed to any conscious pain and suffering or to his death. Her attorneys were guilty of shocking and prejudicial misconduct in injecting this extraneous, impertinent and immaterial issue into the pleadings, evidence and argument to the jury. It was a clear and inexcusable violation of the spirit, if not the letter, of Rule 11, F.R.C.P. No clearer characterization of that misconduct is needed than the statement of the trial court, *amazing* in the sense that he had knowingly permitted and aided in causing the minds of the jurors to become saturated with this prejudicial appeal to passion—as follows: "*It is thrown in,* so far as reading the complaint is concerned, *as kind of a gratuitous observation that they were a callous employer,* * * *." (R.T. p. 848; T.R. p. 567.) That was the sole and exact reason for the injection of said subject matter into the minds of the jurors. Appellant, just as much as the appellee, was entitled to a *good climate* in which to have its rights protected by a fair and impartial jury. This subject was forcefully injected for the illegitimate *psychological* effect it would exert on the minds of the jurors in boosting the appellee's *weak and emaciated* case "over the top". None of this could have occurred if the trial court had granted appellant's written motion,

filed, presented and denied on October 10, 1952. (T.R. p. 10.) Said motion was based upon Rule 12(f), F.R.C.P., pursuant to which "upon motion made by a party before responding to a pleading * * * the Court may order stricken from any pleading any * * * immaterial" or "impertinent * * * matter." The ruling denying said motion was prejudicial error. The trial court condemned its own prior rulings with respect to this subject by its obviously correct but belated characterization thereof, after all the harm had been done; and thereby also affirmatively indicated its lack of impartiality as between the respective parties. It is elementary that one of the essential requisites of due process of law as guaranteed to all litigants pursuant to Amendment V, U.S. Constitution, is an absolutely impartial court.

The Jones Act adopts, by reference thereto, all statutes of the United States *modifying or extending* the *common-law right or remedy* in cases of personal injury to employees of common carriers by railroad engaging in interstate or foreign commerce, while such railway employees are employed in such commerce; and provides by direct, concise and clear language that in any action maintained by a seaman who shall suffer personal injury *in the course of his employment* said statutes *shall* apply. (45 U.S.C., § 688.) The adopted statutes modify the theretofore existing common-law right or remedy applicable to the relationship of employer-employee in respect of tort actions by eliminating the fellow-servant doctrine, and the defense of contributory negligence; substituting for the latter the theory of comparative negligence. They also eliminate the defense of assumption of risk in any case where the injury "resulted in whole or in part from the negligence of any of the *officers, agents,* or *employees* of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such

common carrier of any *statute* enacted for the safety of employees contributed to the injury of such employee." (45 U.S.C., §54.)

Said statutes, adopted by reference thereto in the Jones Act, also *extend* the theretofore existing common-law remedy with respect to the recovery of damages by reason of personal injuries suffered *in the course of the employment* by providing in § 59, 45 U.S.C. (a part of Chapter 2 of the Federal Employers' Liability Act) that "Any *right of action* given by *this* chapter to a person *suffering injury* shall *survive* to his or her personal representative for the benefit of the surviving widow * * *."

There are two *non-statutory* rights of action created by case-made admiralty and maritime law of the United States pursuant to which a *living* seaman may recover damages by reason of personal injury.

(1) If he suffers injury in the service of the ship as a proximate result of its unseaworthiness or a failure to supply and keep in order the appliances appurtenant thereto, he has a right of action, regardless of fault or the absence thereof on the part of the employer or any of its agents or employees, pursuant to which he may recover all damages proximately resulting from the breach of warranty of seaworthiness. The liability of the employer is absolute. It is not, however, a common-law right or remedy. It does *not* survive the death of the injured seaman.

(2) If *subsequent* to suffering a personal injury *in the course of his employment* (e.g. while engaged in any activity required in the performance of the duties pertaining to his particular position as a member of the crew; or is doing anything which is in any manner incidental to his required duties (*Sundberg v. Washington Fish & Oyster Co.,* 138 F.2d 801; *Wong Bar v. Suburban Petroleum Transport,* 119 F.2d 745) the master of the ship, who is

the *agent* of the common employer for *this* purpose, negligently fails to provide all reasonably *required and available* medical, surgical and hospital care and the *original* injuries suffered *in the course of the employment* are *aggravated* as a proximate result thereof, the seaman has a right of action pursuant to which he may recover damages proximately resulting *solely* from the aggravation. No damages by reason of whatever disability and pain are *the sole proximate result* of the *original* injury may be recovered in *this* non-statutory right of action. (*Union Oil Company v. Hunt,* 111 F.2d 269-277.) This right of action does *not* survive the death of the seaman. It is not based upon a personal injury suffered by the seaman *in the course of his employment.* There can be no personal injury suffered in the course of the employment, in any event, unless the conventional relationship of employer and employee is in force and effect at the very time of injury.

The duty to provide medical, surgical and hospital care when required and available arises out of the fact that the personal injuries were sustained while the contract of employment was in full force and effect. The fact that this duty must be performed after the termination of the contract will not support a conclusion that the conventional relationship of employer and employee continues to exist so that any additional injury suffered by a negligent failure to provide any care or inflicted by negligent action in the course of actual attempted treatment is a personal injury suffered *in the course of the seaman's employment.*

There is only *one* right of action given by any part of Chapter 2, Federal Employers' Liability Act, to a person suffering injury. That right of action is given by section 1, Chapter 2 of said Act. (35 Stat. 65; 45 U.S.C., § 51.) The sole and exclusive legislative authority of the Congress to create such right of action is derived from and

limited by its constitutional power (Art. I, Section 2, Clause 3) "To regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes." (*In Re Second Employers' Liability Cases,* 32 S.Ct. 169, 223 U.S. 1, 56 L.Ed. 327.) The only part of "the statutes of the United States modifying or *extending* the *common-law* right or *remedy* in cases of personal injury to railway employees" (41 Stat. 1007, 46 U.S.C., § 688) which has anything to do with the *survival* of a right of action in respect of personal injury is § 9, 36 Stat. 291, 45 U.S.C., § 59. This section provides that "Any *right of action* given by *this* chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow" etc., "but in such cases there shall be only *one* recovery for the *same* injury." *Expressio unius est exclusio alterius.*

The essential and *exclusive* factual bases of the *statutory right of action* for *injury* given by Chapter 2, F.E.L.A., the *concurrence* of all of which are necessary conditions precedent thereto, are the following:

1. The employer must be a *common* carrier engaging in interstate or foreign commerce.

2. The employee must suffer injury while he is employed by such carrier in such commerce.

3. The injury must be one "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Appellant contends that the said right of action is incontrovertibly and exclusively statutory; and that said statutory right of action is the *only* right of action which survives to the personal representative of a seaman who has suffered "personal injury in the course of his employ-

ment." *Non-statutory,* general maritime law rights of action arising *ex contractu* or *ex delicto* as a result of personal injury are not within the orbit of § 9, F.E.L.A., 45 U.S.C., § 59. The Jones Act is quite clear on the intention of the Congress in this respect. It is therein specified that "any seaman who shall suffer personal injury *in the course of his employment* may * * * maintain an action for damages * * * and in *such* action all *statutes* of the United States *modifying or extending* the *common-law* right or remedy in cases of personal injury to *railway* employees *shall* apply." (41 Stat. 1007, 46 U.S.C., § 688.) *Expressio unius est exclusio alterius.*

With the exception of the absence of an averment showing that the appellant was a *common* carrier engaged in interstate or foreign commerce at the time Hutchison suffered the injuries from which he died (*jurisdictional* requisites), and that Hutchison was employed in such commerce, the first eight paragraphs of the first amended complaint contain averments which, if admitted or proved, show that the pleader is entitled to relief on the basis of the survival of the right of action for injury given by the first section of chapter 2, F.E.L.A. Such statutory survival right of action would accrue and become vested in the personal representative at the instant of death. The measure of damage is the pecuniary value of *all* conscious pain and suffering proximately resulting from *the* personal injury suffered *in the course of employment.* It is not permissible to attempt to split the said conscious pain into various parts and set up separate counts or claims based thereon. Pain is an element or item of *damage* proximately resulting from an original tort. It is indivisible in the sense that a litigant cannot contend that each interruption and subsequent recurrence of actual pain will constitute a new basis of actionable negligence. *If* N. P. Hutchison suffered *any* injury *in the course of*

his employment, such injury was suffered when he struck the bottom of the ventilator shaft. The *proximate* result or results of such injury cannot be divided into separate and successive parts or rights of action.

Appellant contends that while Hutchison was lying at the bottom of the ventilator shaft during the period of time which elapsed between the instant he suffered the "devastating and permanent personal injuries" and his death, he was *not* acting *in the course of his employment;* and, therefore, could not during that interval of time have suffered any personal injury *in the course of his employment* as a seaman. It would be illogical to suggest that he was then engaged in the performance of any personal service or doing any other act or thing within the requirements of or in any manner incidental to his duties as a seaman and member of the crew. In the absence of at least one of these alternatives he was not acting in the course of his employment. (*Thompson v. Eargle,* 182 F.2d 717; *Sundberg v. Washington Fish & Oyster Co.,* 138 F.2d 801; *Wong Bar v. Suburban Petroleum Transport,* 119 F.2d 745; *The Norland,* 101 F.2d 967; *States S.S. Co. v. Borglann,* 41 F.2d 456; *Griffin v. I.A.C.,* 19 C.A.2d 727, 66 P.2d 176; *Adams v. American President Lines,* 23 C.2d 681, 146 P.2d 1; *Desper v. Starved Rock Ferry Co.,* 72 S.Ct. 216, 342 U.S. 187, 96 L.Ed. 205.) In addition, it is obvious that he could not have been, during that period, subject to any call to duty.

The personal injuries suffered by N. P. Hutchison consisted of extensive linear fractures of the skull and some serious injury to the brain which resulted in a subdural hemorrhage. (R.T. pp. 255-258; T.R. p. 256.) Appellant contends that when it becomes *impossible,* by reason of "*devastating* and *permanent* personal injuries" for an employee to perform *any* part or portion of the personal services for which he was engaged, the conventional rela-

tionship of employer-employee is *terminated.* (35 Am. Jur. p. 465; Anno. 21 A.L.R. 2d 1247.) The actual existence of this relationship at the precise time of suffering a personal injury is an essential requisite of a right of action under the Jones Act. (*Cosmopolitan Shipping Co. v. McAllister,* 69 S.Ct. 1317, 337 U.S. 783, 93 L.Ed. 1692; *Dougall v. Spokane, P. & S. Ry. Co.,* 207 F.2d 843, cert. den. 74 S.Ct. 429, 347 U.S. 904, 98 L.Ed. 1063; *The Norland,* 101 F.2d 967.)

Appellant was entitled to a good climate in which to try the case. The record affirmatively shows that after the jurors had been deliberating from approximately 2:00 p.m. (after returning from lunch on October 14, 1955) until 10:23 p.m., some of them were not willing to return a verdict in favor of appellee on the claim for damages by reason of the death upon the basis of a finding in favor of appellee in respect of the averred negligent omission set forth in paragraph VIII, but wanted to do so on the theory that the failure to search *in the ventilator shaft* and *discover* N. P. Hutchison before he died was the proximate cause of his death. (R.T. p. 843; T.R. p. 562.) *Before* the jurors had deliberated they were told by the trial court that they could not do this. (R.T. pp. 784-785; T.R. p. 517.)

The prejudicial effect of evidence with respect to a matter no part of which is specifically, precisely, or definitely relevant and material to a genuine issue of *actionable* negligence cannot be denied. "It is fundamental that evidence must be relevant to the issues in a case before it can be admitted. Evidence having no relevancy to any issue in the case may, therefore, be properly excluded, and its admission constitutes error. Moreover, it must bear on an issue which is material in the case." (18 Cal. Jur. 2d 553; § 116.) The "search for and discover" evidence had no place in the record and it was prejudicial error to

permit the appellee to introduce it because, by her pleading with respect to the element of conscious pain and suffering and also her claim for damages by reason of the death, she confined and restricted herself to the *sole and specific* claim that the personal injuries were directly caused by an alleged negligent *omission* to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. (*Union Oil Co. of California v. Hunt,* 111 F.2d 269, 277.)

The mere fact that the jury returned a verdict in favor of appellant on the claim set forth in the first 8 paragraphs of the "First Cause of Action", is not necessarily indicative of the conclusion that its verdict against the appellant on the "Second Cause of Action" was uninfluenced by the evidence of the failure on the part of some person aboard the vessel to actually look into the ventilator shaft and discover N. P. Hutchison in an injured but living condition. The record affirmatively shows that at least some of the jurors were so rebellious and their minds so prejudicially impregnated by this immaterial and impertinent subject matter that they were not willing to and did not accept or follow the instruction given to them in respect of this "red herring" before they *commenced their deliberations.* (supra.)

The jurors went to lunch at 12:55 p.m., October 14, 1955 (R.T. p. 825; T.R. p. 550); and to dinner at 5:10 p.m. Their deliberations continued, except for lunch and dinner, from 12:55 p.m. until 10:23 p.m. of the same day. (R.T. pp. 829-830; T.R. p. 551.) At this time the jury returned to the courtroom for further instructions, *inter alia,* "regarding failure to conduct a search, and that this form of negligence could apply only to the first cause of action; explain why this can not apply to the second cause of action" (R.T. p. 830; T.R. p. 82.) Upon this occasion the trial court indulged in a long, indistinct and

obviously erroneous dissertation with reference to the subject of negligence in failing to conduct a search. (R.T. pp. 830-832; T.R. pp. 551-553.)

In spite of and *subsequent* to this, the foreman of the jury made the following statement, in the presence of all the rest of the jury: "Your Honor, *I feel sure* that *some* jurors *still* feel that they should be permitted to consider the matter of negligence in not conducting a search, in connection with the cause of action, the second cause of action. If you wish I can tell you why." (R.T. p. 843; T.R. p. 562.) None of the jurors challenged or disagreed with that statement. All of the jurors, by remaining *silent* agreed with and corroborated the clear statement of the foreman.

The foreman had *actual* knowledge of what had transpired in the jury room and he expressed his unqualified conclusion, based thereon, that in spite of the instruction to consider the matter of negligence in not conducting a search only with reference to the "first cause of action", some of the jurors were still determined to use this evidence in connection with the second cause of action. This recalcitrant attitude of the jurors was not conducive to a fair and impartial finding of fact with respect to the sole claimed negligent omission referred to in paragraph VIII. The jurors who had demonstrated that they were willing to disregard the original instruction continued to be the same type of persons. If they would refuse to follow the instruction the first time it was given they would continue such refusal; but in voting for a verdict in favor of appellee they would not be inclined to announce in the jury room, that they were doing so on the basis of a finding of actionable negligence in not conducting a search. They would just vote and remain silent with respect to the reasons.

If the trial court had submitted a separate form of verdict or special interrogatories which would require a

definite affirmative or negative vote by each juror on this subject, the jury might very well have been constrained to render a verdict in appellant's favor on "the second cause of action."

Appellant was entitled to a good climate in which to try its case. The "failure to search and discover" theory should not have been permitted to enter the jury's minds. The trial court was convinced that he did not dare submit a separate form of verdict or an interrogatory with respect to this subject for the reason, as he expressed it, that appellant could "appeal on the ground that it is not the cause of action that is pleaded in the amended complaint, and I think you would be sustained on it." (R.T. pp. 850-851; T.R. p. 569.) He thereby definitely indicated that while he was willing to permit the appellee and the jury to juggle and play with this extraneous matter, no verdict could properly be based upon it. Therefore, it should have been excluded altogether.

The brief for appellant Emma Hutchison, on the first appeal, case No. 13,852, prepared and signed by Raymond C. Simpson and George E. Wise, is quoted with respect to this subdivision of this brief, as follows:

> "The attitude of the Federal Courts toward the interjection of * * * appeals to prejudice or passion has been clearly stated in so many cases as to now require but a brief statement. In substance the Courts have held that remarks made in the presence of the jury which tend to excite their prejudices or passions, or to cause resentment or unjustly enlist their sympathies in favor of one adversary as opposed to another, are always improper and should be avoided."
>
> (Br. for Appellant Emma Hutchison, p. 22, ll. 4-12.)

> "Under our system of jurisprudence, *it is the duty of* the court and its officers, *the counsel of the parties*, to *prevent* the jury from *consideration of ex-*

traneous issues, of *irrelevant issues,* of *irrelevant evidence,* and of erroneous views of the law, to *guard it against the influence of passion and prejudice,* and to assure to the litigants a fair and impartial trial. An *omission* to discharge this *duty,* or a persistent violation of it, *makes the trial unfair.*''

(Br. for Appellant Emma Hutchison, p. 27, ll. 14-21.)

They are thus pierced by their own sword.

As this Court said: ''* * * the atmosphere in which the trial was had permeated the entire case to the prejudice of the appellant and warrants the conclusion that the appellant did not get a proper trial.'' (*Hutchison v. Pac. Atl. S.S. Co.,* 217 F.2d 384, 386.)

It is respectfully submitted that appellant suffered substantial prejudice by reason of each and all of the foregoing matters.

(b) THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN ADMITTING AND REFUSING TO STRIKE ORAL AND DOCUMENTARY EVIDENCE NOT RELEVANT OR MATERIAL TO ANY ISSUE OF ACTIONABLE NEGLIGENCE.

The assigned errors involved here are 3, 4, 6, 22, 23 and 32. By reference thereto appellant incorporates herein as part of its affirmative argument in support thereof all of said assignments of error and the objections and motions, including the grounds stated in respect of said objections and motions, as set forth in the specification of errors, *supra.* It also incorporates herein its preceding argument with respect to the immateriality and impertinence of the extraneous matter contained in paragraph IX.

The principle that the tort liability of a corporation is vicarious is elementary. Such entity can not perform any act or omit any matter or thing excepting by and through some officer, agent or employee acting within the course

and scope of his agency or employment. (*Reynolds v. N.Y.O. & W. Ry. Co.,* 42 F.2d 164, 167-168; *Fimple v. Southern Pac. Co.,* 38 C.A. 727, 732, 738-739, 177 P. 871.)

It is axiomatic that no evidence with respect to any claimed negligent act or omission is admissible in the absence of averments in the complaint setting forth such claimed negligence and the existence of the essential proximate causal connection between the same and the resulting damage. (20 Am. Jur. p. 239, § 246; 20 Am. Jur. p. 242, § 248; 20 Am. Jur. p. 245, § 51; 31 C.J.S. pp. 864-866, § 158; 31 C.J.S. p. 868, § 159; *Wilkerson v. City of El Monte,* 17 C.A.2d 615, 624, 62 P.2d 790.)

1. There is no averment in the pleading stating that the appellant or any agent or employee, in or out of the course of his agency or employment, failed, *negligently or otherwise,* to *account for the working hours or places of Hutchison or that such, if any, omission proximately caused or contributed to the personal injury suffered when he struck the bottom of the ventilator shaft; or to his death.* Nevertheless, in clear contravention of the fundamental right of appellant to due process of law in the form of actual notice that such issue was tendered as an element of *claimed* actionable negligence, and in total disregard of the specific and sole issue raised by the pleadings, the trial court permitted appellee to sneak up in the darkness of an *unpleaded* matter and slug the appellant in the back of the head with the *admittedly hearsay* and irrelevant "testimony" of Crawford that a custom in effect on April 1951 required an employer of a seaman "to *account* (e.g. to keep track of by *observation*) for the *working* hours and *places* of *each* member of the crew *at all times.*"

> "Proof of a custom can not be said to be enough to submit that issue to the jury unless there is substan-

> tial evidence to show that what is called custom amounts to a definite, uniform, and known practice under certain, definite and uniform circumstances."
>
> *McClellan v. Pennsylvania R. Co.,* 62 F.2d 61, 63.

Appellant contends that whenever a plaintiff bases a claim of negligence upon the violation of a custom, not claimed to be a custom of the particular defendant involved, *such* custom must be *pleaded.* Crawford did not testify that he had ever been in Baltimore or in any other part of Maryland. If custom, practice or usage could have been relevant in the case at bar there would have to be evidence showing that such custom, practice or usage was in existence at Baltimore, Maryland, on whatever date it was that Hutchison fell or got into the ventilator shaft.

The jury *could* have used this irrelevant and impertinent testimony to concoct a basis of liability on the theory that it was the duty of appellant to have somebody assigned to the specific job of *watching* Hutchison *at all times and in all places;* and that if such duty had been performed Hutchison would have been immediately rescued from the bottom of the shaft, taken to a hospital, operated upon and thus his life *might* have been saved; or, perhaps, that such "watchman" could and should have warned Hutchison or otherwise *prevented* him from falling to the bottom of the shaft. The realm of speculation, surmise and conjecture which can be suggested by the ingenuity of a *sympathetic* jury is practically infinite. The trial court refused to tell the jury that it was not entitled to speculate, surmise or conjecture; and on the contrary left the gate to this field wide open. While the trial court read two paragraphs of the complaint to the jury it did not at any time *state or define* the issues and, in fact, *deliberately refused to do so.* The trial court in its instructions called the attention of the jury to every factual

basis of possible liability within the four corners of the Jones Act and thus invited the jury to make use of them in deciding that appellant was liable. (T.R. p. 775.)

When a plaintiff has averred that an injury or death was proximately caused by a single specific negligent omission evidence as to *other* claimed negligent acts or omissions is inadmissible. (*Wilkerson v. City of El Monte,* 17 C.A.2d 624, 62 P.2d 790.)

Evidence, including appellant's answer to written request for admission 1(c), upon the subjects of the lack of permanent artificial lighting fixtures inside the port compartment of masthouse number 2; and the degree of visibility therein with the door closed; and Crawford's testimony and conclusion with respect to the thorough artificial illumination of all work areas, such as masthouses, was clearly irrelevant and prejudicial in the total absence of other and additional *testimony* showing, or from which it could be reasonably inferred, that at any time when Hutchison *could* have been in the masthouse "in the course of his employment" said door was closed; hatch number 3 was covered and that no natural light was entering through the port ventilator cowl; or that the degree of visibility then actually present was not sufficient to enable him to see and recognize, by the normal use of his faculties of perception, all of the things within the area of the masthouse. (*Smith v. Arcadia Overseas Freighters,* 202 F.2d 141; 20 Am. Jur., p. 245, § 51; 31 C.J.S. p. 874, § 164; 18 Cal. Jur. 2d p. 556, § 117; *Shanahan v. So. Pac. R. Co.,* 188 F.2d 564, 567-568, and *Hoffman v. Palmer,* 129 F.2d 976, 998.)

3. Without requiring the slightest preliminary foundation or subsequent additional evidence that the ventilator shafts he had observed on "other ships" were in areas *substantially similar* in design, construction, in-

tended purpose, and the relative locations of each with respect to the others, in comparison with the *inside* of the port compartment of masthouse No. 2 aboard the "Linfield Victory", the court permitted Amundsen to testify (and refused to strike the same) that "other ships got screens down here" over the openings of the ventilator shaft; that he had not seen on other ships, in masthouses, a ventilator opening without a ladder going down it; that on other ships having access ladders in a masthouse, the arrangement of the guard rails in masthouse No. 2 were different than those on other ships, in that on other ships the bars go right across the area above the starboard edge of the access shaft containing the ladder; and permitted Crawford to testify (and refused to strike the same) that he had seen "a heavy screen which excludes the danger; which would exclude a dangerous area when there was an area of access immediately close to it or in the vicinity."

Amundsen did not testify that he had ever seen a screen over the top of any ventilator shaft when there were pipe railings barricading what would otherwise be open sides or edges at the head thereof; or that he had ever seen a ventilator opening or shaft of the type installed in the port compartment of masthouse No. 2 with a ladder going down it. It is obvious that some ships might and probably do have a single shaft used as a *combination* ventilator and access shaft to permit ventilation of lower holds and passage to and from lower deck levels. Such combination shaft would obviously have a ladder in it. Crawford did not testify that he had ever seen a heavy screen surrounding a ventilator shaft of the type installed in the port compartment of masthouse No. 2.

There is no evidence in the record showing that all masthouses are designed or constructed in a substantially similar manner.

The court admitted this evidence upon the premise that the jury would be entitled to find therefrom that the appellant negligently failed to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work, upon the theory that the appellant could have absolutely insured the safety of Hutchison by making it utterly impossible for him to have gotten into the ventilator shaft in any manner whatsoever or at all.

Appellant respectfully submits that it is paradoxical to say, *as a matter of law,* in one breath that the employer of a seaman is not an insurer of his safety and is not required to furnish a place of work which is absolutely safe, and in the next breath to say that a jury is entitled to find *as a matter of fact* that such employer is guilty of negligence upon the sole ground that it did not make such place so absolutely safe that it would be utterly impossible for any seaman, careful or careless, to suffer the slightest injury.

If, as appellant contends, the admission of this testimony was error, it is an absolute certainty that it was prejudicial error. The authorities last cited, supra, immediately previous to the argument of this subdivision (3) are likewise applicable here.

Neither of these witnesses stated when, with reference *to April 24, 1951,* he had seen what he testified he saw on "other ships", or "some other ship".

The trial court relied upon Wigmore on Evidence, 3rd Edition, § 461, in admitting this testimony. He overlooked or forgot subdivision 3 of said § 461, on page 490, which provides that "The conduct of others must have occurred under *circumstances substantially similar.*" (e.g. A vessel owned by the United States, bare-boat chartered to the defendant, with a specific prohibition against making *any*

structural changes in the appurtenances without prior written consent of the owner.)

The trial court also erroneously admitted and refused to strike the conclusion and opinion of Crawford to the effect that the ventilator shaft was a dangerous area and that the heavy screen referred to was for the purpose of excluding such dangerous area and that there was an area of *access* immediately close to it.

Appellant respectfully submits that it has sufficiently covered its contentions in respect of the testimony of Castle, Kalnin, John Hutchison, Adelstein and Dickerson in the incorporated matter referred to in the first paragraph of this subdivision of its brief and will therefore present no further argument with respect thereto.

(c) THE COURT ERRED IN PREJUDICING THE JURY AGAINST APPELLANT AND REFUSING TO GIVE APPELLANT A REASONABLE TIME AND OPPORTUNITY TO STATE DISTINCTLY THE MATTER TO WHICH APPELLANT OBJECTED WITH RESPECT TO THE GIVING AND THE FAILURE TO GIVE INSTRUCTIONS AND THE GROUNDS OF ITS OBJECTIONS.

The pertinent specification of error involved here is 9.

1. The jury, just before the commencement of the final argument of appellant's attorney, was prejudiced against the appellant by reason of what the trial court, in effect, told the jury would be an unreasonable, unwarranted and useless waste of at least a substantial part of the noontime recess of an hour and a half to which the jury was entitled according to custom. At the outset of the instructions the trial judge stated: "I *am* a *lawyer* and what I tell you comes from the law books or from my *reasonable* application of the principles in the law books to the law of this case." (R.T. p. 757; T.R. p. 494.) Naturally, the jury accepted this as incontrovertible.

In the morning of the previous day, the trial court stated, out of the presence of the jury, as follows: "It is just not conducive to the proper tranquility that the *jury* should have, for us to spend an hour and a half or two hours in the stating of exceptions". (R.T. p. 600; T.R. pp. 356-357.) "* * * I hope we can keep the exceptions down to where the *jury* doesn't become *irritated* at any of the personnel here, either you or Mr. Simpson, or the Judge *because of the extended duration of the statement of exceptions.*" (R.T. p. 602; T.R. p. 358.)

After the trial court had completed what appellant claims no one should deny was a one-sided, prejudicially erroneous charge, amplifying every possible element favorable to the appellee, expanding the issues far beyond the sole and specific issue with respect to the claimed negligent omission of the appellant, and self-contradictory and conflicting, the trial court announced in the presence of the jury that it was noontime. It was not required, in view of the fact that the instructions had not been completed and the jury could have been excused for the usual lunch-time recess, that the jury be deprived of this expected privilege. Accordingly, appellant's attorney requested the trial court to excuse the jury so that it might go to lunch. Having already announced its belief that an extended statement of exceptions would upset the tranquility of the jury and cause it to be irritated with respect to whoever might be responsible for compelling it to sit around, either in the court room or in the jury room, the trial court in an angry mood announced, in the presence of the jury, as follows: "They won't have to sit long. Except in a *couple* of *extraordinary* cases I have had, the statement of these matters has *never* taken more than *five or ten minutes,* and *I am not going to let it take more here, and I don't think anyone would offer more here.*" (R.T. pp. 795-796; T.R. p. 527.)

Having already attempted to adversely propagandize appellant's attorney by its dissertation with respect to *tranquility and irritation* of the *jury* on the previous day, the trial court in the presence and hearing of the jury, attempted, by the foregoing statement, to intimidate or coerce appellant's attorney to the point where he would, rather than incur their displeasure, confine his objections or exceptions to a time not in excess of "five or ten minutes" because no reasonably competent or average attorney would offer objections or exceptions which would require more time.

The jurors are presumed to know the definition of the word "lawyer". According to Webster's New International Dictionary, Second Edition, Unabridged, a "lawyer" is "one versed in the laws" and a "case lawyer" is one "who is specially versed in the details of the decisions of the courts, rather than in the science of the law, and theoretical law." Thus, a lawyer is one versed in the science of the law. The trial court told the jury, in effect, that anyone who took more than five or ten minutes to object or except to the instructions given or refused was not a "lawyer" or even a "case lawyer". The trial court pyramided the prejudicial effect of the foregoing statements by *inaccurately* telling the jury, after proceedings at side-bar which were *visible* to the jury so that they could observe that appellant's attorney was the only one who made *any* statements to the trial judge, that the ensuing procedure would require "several *minutes*". (R.T. pp. 795-797; T.R. p. 528.) They did not go to lunch until almost 1:00 o'clock. (R.T. p. 825; T.R. p. 550.) Can this Court say that appellant was *not* thereby prejudiced?

2. Rule 51, F.R.C.P., provides, in part, that "No party may assign as error the giving or the failure to give an

instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity *shall* be given to make the objection out of the hearing of the jury." Rule 46, F.R.C.P., provides, in part, that "If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Appellant contends that any party has an absolute right, not within the control of any discretionary power of a trial court, to take as much time as is necessary to assign as error the giving or the failure to give instructions in order to state distinctly the matter to which he objects and the grounds of his objection. The only possible curb with respect to this absolute right is that there be no repetition of any matter to which the party has distinctly stated his objection and the grounds thereof.

The right to make the particular kind of record which the rules require in order to effectuate the absolute right to take an appeal is not subject to any curtailment by the trial court, and a deprivation thereof is prejudicial, reversible error. This point is immaterial unless this Court takes the position that some of the errors of which appellant hereinafter complains with respect to the giving or the failure to give instructions are not available for the reason that Rule 51, F.R.C.P., has not been complied with in respect of such matters.

Appellant's attorney, before commencing the statement of its objections and exceptions, took a specific exception to the remarks of the trial court, in the presence of the jury, to the effect that "ordinarily competent lawyers would not (take) exceptions which took more than five or ten minutes" and stated that "It is impossible for me to state the exceptions that I have to *the charge* which

you have *given* in any five or ten minutes. It is physically impossible." Appellant's attorney requested one hour. The court arbitrarily imposed a limit of one-half hour. He then reduced it to 26 minutes. An objection was made to the restriction and it was contended that it was impossible to comply with the rule within this limit. The trial court, exhibiting his anger, then stated: "I don't care about your contentions." (R.T. pp. 796-798; T.R. p. 529.)

When an attempt was made to state distinctly the matter to which appellant objected and the grounds of its objection to the instruction that the fact that the United States has or had an interest in the vessel does not affect the responsibility of the appellant, the trial court peremptorily interrupted with the statement: "I don't care what grounds you state." A request to state it for the benefit of the United States Court of Appeals was abruptly halted with the statement: "They will know what you are getting at." (R.T. p. 799; T.R. p. 530.) Other examples of the same type are the following: The instruction in respect of the physical structure of the ship (R.T. pp. 799-800; T.R. p. 530); The exception to the refusal to submit an interrogatory requesting the jury to state on what date Hutchison suffered his injuries and at what time on such date (R.T. pp. 808-809; T.R. pp. 538-539); The refusal of the court to give Defendant's Proposed Instruction No. 14-A (R.T. p. 811; T.R. p. 640); Refusal to give Defendant's Instruction No. 17 (R.T. p. 812; T.R. pp. 541-542).

Before appellant's attorney had an opportunity to any more than scratch the surface or hit all the high spots he was peremptorily stopped with the unjustified and inapplicable statement of the court: "You are not going to run this courtroom." (R.T. p. 817; T.R. p. 546.) There is

nothing in the record to indicate that appellant's attorney was trying to do anything except his duty.

Appellant's attorney intended, in the event the trial court would permit him to do so, to go through each of the refused instructions and point out distinctly to the trial court all of the essential matters therein contained which had not been covered by the instructions given; and also to point out how other (and up to that point unmentioned) erroneous statements and assumptions in the instructions as given were prejudicial and in direct conflict with the law applicable to the issues and evidence in the case.

During this unusual proceeding, the trial court made the statement that appellant's attorney came into court with the announced intention to appeal if he lost, and to trick the court into error; and that the judge couldn't try this case without error that he could get it reversed on. (R.T. p. 809; T.R. pp. 538-539.) *Nothing* in the record supports this statement. In its request for the preparation of the record in the court below, appellant specifically requested that this be included if it existed.

The trial court exhibited the deep animosity he harbored against appellant's attorney by indulging in the statement of an unjustified and insulting personality: "*Your face has been twitching, you have been blinking like Susie on television.* You have been an absolutely intemperate advocate here." (R.T. p. 980; T.R. p. 539.)

Judge Tolin forgot that only the day before, on October 13, 1955, he had stated, in response to a direct question whether he had any criticism of the conduct of appellant's attorney in the presence of the jury, at least up to that time, as follows: "Actually I don't know. *I haven't felt moved to make any.* I think you have gotten overly zealous in your case. *I wouldn't say that there is*

any reason to say that you had misconducted yourself." (R.T. p. 597; T.R. p. 354.)

Appellant contends that no attorney could, within the time limit imposed upon its attorney by the trial court, state distinctly or otherwise the clearly available objections to the instructions as given by the court or in respect of the refusal to give the requested instructions.

In support of a contention, if it is necessary, that appellant should not be restricted, on this appeal, to the specific objections which were actually made to the giving and the refusal to give instructions, it cites the following authorities

Williams v. Fowler, 135 F.2d 153;

Wright v. Farm Journal, 158 F.2d 976;

Lumbermen's Mut. Cas. Co. v. Hutchins, 188 F.2d 214;

Harlem Taxicab Ass'n. v. Nemish, 191 F.2d 459; and

Delaware & Hudson Co. v. Ketz, 233 F.2d 31.

(d) THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT WITH RESPECT TO THE CLAIM OR COUNT DESIGNATED AS THE "SECOND CAUSE OF ACTION" AND IN DENYING ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The assignederrors involved here are: 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

The facts to be discussed are set forth with appropriate references to the record in the "Statement of the Case." In addition, appellant by reference thereto incorporates herein, as part of its affirmative argument, all of the grounds and argument in support of its motions for directed verdict and for judgment notwithstanding the verdict, as follows:

1. Motion for directed verdict at the close of plaintiff's evidence. (R.T. pp. 392-402; T.R. pp. 291-302.)

2. Motion for directed verdict at the close of all of the evidence. (R.T. pp. 578-580; T.R. pp. 338-340.)

3. Motion for judgment notwithstanding the verdict. (T.R. pp. 86-89.)

Appellant by reference thereto incorporates herein and makes a part hereof the oral argument of its attorney, to the jury, from and including page 642, R.T., T.R. p. 389, to and including R.T. 719, T.R. p. 460.

One of the basic propositions involved in a case premised upon the Jones Act, as implemented by the F.E.L.A., is the following: If a seaman, *while exercising ordinary care for his own safety,* suffers personal injury in the course of his employment, the employer is liable for the *total* amount of the damage proximately resulting therefrom if such injury has resulted in whole or in part by reason of negligence on the part of the employer. If the law were otherwise it would never be possible for an injured seaman, in any case, to recover the *total* amount of the damage sustained. No employer of a seaman is required to *anticipate or provide against negligent, improper or unusual conduct* on the part of the *employee* in his use of the place of work or the appliances appurtenant thereto. Therefore, if a place of work is reasonably safe *when used with ordinary care by the employee* there is no basis of liability on the part of the employer. (*Renaldi v. N.Y., N.Y. & H.R. Co.,* 230 F.2d 841, 844.)

The foregoing propositions are fully supported by the following authorities: 56 C.J.S. pp. 1005-1006, § 51; *Vileski v. Pacific-Atlantic S.S. Co.,* 163 F.2d 553; *Meintsma v. United States,* 164 F.2d 976; *Heder v. United States,* 167 F.2d 899; *Gibson v. International Freighting Corp.,* 173 F.2d 591; *Shields v. United States,* 175 F.2d 743; *Larsson v. Coastwise Line,* 1950 A.M.C. 176, 181 F.2d 6; and *Atlantic Coast Line Ry. Co. v. Dixon,* 189 F.2d 525.

> "The judge had charged that the plaintiff must make reasonable use of his own faculties to observe

> and avoid danger, and that he must be presumed to know what the ordinary use of his faculties would make apparent to him. *This was equivalent to saying that he might not be careless of his own safety, if the defendant was to be liable.*"
>
> *Nagle v. Isbrandtsen Co.,* 177 F.2d 163, 164.

It is a matter of common knowledge, particularly within the scope of judicial notice by a court experienced in cases of admiralty and maritime jurisdiction, that pipe railings, exactly the same in design, construction and purpose as those surrounding what would otherwise have been two open sides at the head of the ventilator shaft in masthouse No. 2 aboard the "Linfield Victory" have been in use, and furnishing at least reasonable safety, for many years along the edges of catwalks located high above the floor or deck of engine rooms; along the athwartship edges of boat decks, bridge decks and flying bridge decks located high above the level of the main deck; along the port and starboard edges of decks high above the water through which a ship may be navigated and that around the edges of uncovered hatches in decks below the main deck of ocean-going vessels there is never anything provided in the way of barricades excepting a temporary rope or chain strung through holes or links attached to stanchions located at the four corners of such hatches. Such appliances have always been considered as all that is reasonably required to warn a *normal* seaman of the presence of the possible danger of falling from such catwalks or decks or into open hatches or to prevent such seaman from inadvertently falling to the surface below. (*Desrochers v. U.S.,* 105 F.2d 919, 920.) It is, therefore, respectfully submitted that this Court should hold, as a matter of law, that the pipe railings surrounding the two sides of the ventilator shaft which would *otherwise* have been open were standard equipment and

all that was required, in the exercise of reasonable care, to make the place reasonably safe. As this Court said, with reference to similar pipe railings located in the engine room of a ship,

> "On each side of the boilers were installed the *customary* hand rails about three feet above the flooring. They were of smooth piping about half an inch in diameter. They served the normal ship's function of affording the fire room crew an appliance upon which they could take hold when the vessel is working in a sea." (*Vileski v. Pacific-Atlantic S.S. Co.,* 163 F.2d 553, 554.)

It is obvious that no seaman *could* slip through, crawl or roll under or climb over a two-course pipe railing along the sides of a high catwalk in an engine room and fall to the deck below and injure himself if instead of the customary pipe railings a six foot solid steel fence or a six foot heavy wire screen is installed along the edges of such catwalk. The same is true with reference to the catwalks running fore and aft high above the main decks of all ocean-going tankers; athwartship edges of decks high above the main deck; and the fore and aft edges of decks high above the level of the ocean. It is also obvious that it would have been impossible for Hutchison to have gotten into the ventilator shaft, regardless of whether he was drunk or sober, of sound or unsound mind, ordinarily careful or grossly careless or even if he wanted to commit suicide, in the event the head of the shaft had been covered with a steel plate, a heavy screen, heavy gratings or planks of wood or if the starboard and aft sides of said shaft at the head thereof had been physically inaccessible under any possible circumstances by the presence of heavy vertical screens or steel plates.

In the argument of appellee's attorney to the jury and in her memorandum in opposition to appellant's motion

for judgment notwithstanding the verdict, the same theory was advanced and appealed both to the jury and to the trial judge. As stated in the written memorandum it is, as follows: "If using reasonable care to make the place reasonably safe means making it at the same time *absolutely* safe, whether by use of screens or other devices, the defendant is still required to do what is necessary to provide a reasonably safe place. An employer is not excused from acting reasonably to make a place of work reasonably safe just because such an act entails doing something which coincidentally makes the place *absolutely* safe." (Page 11.)

Appellant locks horns with the appellee on this fallacious proposition. It has been authoritatively established by much precedent that, *as a matter of law,* the employer of a seaman is not an insurer or guarantor of his safety and is under no obligation whatever to provide an appliance or a place of work which is absolutely safe so that it is *impossible* for the seaman to be injured. The phrases "reasonably safe" and "absolutely safe" are not synonymous. The legal duty imposed upon the employer of a seaman does not, under any circumstances, reach the point where it is required to exercise reasonable care to make the place of work absolutely safe. If the law were otherwise, every employer of seamen would be required to exercise a sufficient amount of foresight and care to absolutely insure or guarantee the safety of each seaman in order to avoid the contingency that the whim or caprice of some jury might cause it to make such a finding.

The legal *duty* of the employer stops *below* the extremely high status of absolute safety and *no jury is permitted to find otherwise.* The established *standards* of care and safety are, respectively, "reasonable care" and "reasonable safety". No more can be squeezed out

of the cases where these propositions have been submitted for *decision* as *disputed* questions of law.

Appellant is aware of the language used, in many cases, that an employer is required to "exercise reasonable care to provide a *safe* place to work." These general observations are *not* precedent supporting a contention that the legal standard is *absolute* or unqualified safety. This specific point was not involved in *any* of these many cases as a *disputed* question of law. The point lurked in the background but was not distinctly involved or ruled upon. (*Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 136, 73 L.Ed. 220, 223.)

The jury probably "found" that the appellant had not acted with reasonable care to make masthouse No. 2 reasonably safe for the sole reason that it had not anticipated a *remote possibility* and had not used the extreme precaution of making the ventilator shaft in said masthouse *absolutely unenterable*. Assume that the trial court had instructed the jury as follows: "You are instructed that the ship owner is not an insurer or guarantor of the safety of any seaman and that no duty is imposed upon such employer to make the place of work or the appliances appurtenant thereto absolutely safe; but, on the other hand, if you find that reasonable care on the part of the ship owner required it to provide a place of work and appliances which were absolutely safe, to the end that it would be utterly impossible for a seaman to be injured, then you will be justified in finding that the ship owner was guilty of negligence if it did not make such place of work or the appliances appurtenant thereto absolutely safe." *Would this Court approve such an instruction if it had been given to the jury in the case at bar?* If the answer is in the negative the judgment must be reversed.

The *standards* of care and safety imposed upon the employer of a seaman are *questions of law,* not of fact. These standards, *as a matter of law,* are "ordinary care" and "reasonable safety." (*Seaboard A.L.R. Co. v. Horton,* 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062; *Baltimore & Ohio S.W. R. Co. v. Carroll,* 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566; *Atlantic Coast Line R. Co. v. Dixon,* 189 F.2d 525, cert. den. 342 U.S. 830, 98 L.Ed. 628; *Vojkovich v. Ursich,* 49 C.A.2d 268, 121 P.2d 803.) Therefore, no jury can be permitted to "find" in a case premised upon the Jones Act, that "reasonable safety" requires "absolute safety." If it were otherwise any jury could change the established legal standard of *reasonable* safety to a standard of *absolute* safety; and thus impose the requirement, as a question of *fact,* that the employer *insure* the safety of the employee.

If the verdict of the jury in this case is upheld on the theory that it was lawfully entitled to find, as a question of fact, that *reasonable care and foresight* required the appellant to physically block all possibility that Hutchison *could* fall to the bottom of the ventilator shaft, then the masthouse of every one of the several hundred Victory ships will have to be revised or rebuilt to avoid the application, as precedent, of the judgment of this Court. Such holding would also apply to catwalks, all deck edges and lower deck hatches on all ships of the American Merchant Marine and cargo vessels owned or operated by the United States. Does the Court feel justified in taking this leap beyond the orbit of established precedent?

It *is a presumption of law,* which the jury and the trial court were *bound* to accept ("rubber stamp"; if one chooses to colloquially express it) in the absence of direct or indirect evidence controverting it, that the masthouse and its appurtenances were *standard and customary*

equipment. Amundsen's testimony as to screens and additional bars across the starboard side of the access shaft and a ladder in the ventilator shaft "on other ships"* and Crawford's testimony that he had seen heavy vertical screens surrounding *a* ventilator shaft on *some* ship, does not prove or tend to prove that the "Linfield Victory" masthouse No. 2 was not in strict accordance with standard, adequate, accepted and customary design and construction.

It was the legal duty of the United States of America, the owner of the "Linfield Victory" pursuant to the bare-boat charter, appellant's Exhibit "B", to deliver the vessel to appellant, "so far as due diligence can make her so, * * * *well and sufficiently* tackled, apparelled, furnished and *equipped,* and *in every respect seaworthy* * * * and *in all respects fit for service.*" (Part II, Clause 1, Appellant's Exh. "B".)

It is a presumption of law, binding upon the court and the jury, in the absence of direct or indirect controverting evidence, that the responsible agents of the government charged with the legal duty of performing the obligations of the government fully discharged their official duty and exercised at least ordinary care with reference thereto. The Congress has recognized and provided by statute that the "American Bureau of Shipping" is a governmental agency. (41 Stat. 998, 49 Stat. 1987, 2016, 46 U.S.C. 881.) It is therefore a presumption of law, disputable but binding unless controverted, that the vessel at the time of delivery was in "Class A-1" as prescribed by the "American Bureau of Shipping". Pur-

*Hutchison fell head first down the *ventilator* shaft. Therefore the absence of a ladder therein or bars across the access shaft could not be a proximate cause of the injury or death. He did not injure his hands or arms. Therefore he must have been inert. Otherwise he would have stretched his arms out to break the effect of the fall.

suant to the aforementioned contractual obligations of the government it was the official duty of the Coast Guard marine inspectors to exercise ordinary care in determining that the vessel was so far as due diligence can make her so, well and sufficiently tackled, appareled, furnished and equipped, in every respect seaworthy, and in all respects fit for service. The bare-boat charter also provided that the appellant was prohibited from making any structural changes in the vessel or any changes in the appurtenances thereof without in each instance first securing the written approval of the government. (Part II, Clause 11.) The vessel was not "*controlled*" by appellant; and the averment that appellant controlled it is unproved. (Para. IV, complaint.)

In the absence of actual or constructive notice to the contrary, the appellant was entitled to rely and act upon the assumption that the government and its duly constituted officials had fully performed all their obligations and duties.

Before issuing the marine inspection certificate referred to in Part II, Clause 1, appellant's Exhibit "B", it was the statutory and official duty of the United States Coast Guard to carefully inspect the vessel throughout and satisfy itself that such vessel was of a structure suitable for the service in which she was to be employed and "in a condition to warrant the belief that she may be used in navigation as a steamer, *with safety to life*". (60 Stat. 1097, 46 U.S.C., § 391.) It was also the statutory and official duty of the United States Coast Guard not to issue a certificate of inspection with respect to the "Linfield Victory" until it had approved the vessel and her equipment *throughout*. (60 Stat. 1352, 46 U.S.C., § 399.) In the absence of evidence, direct or indirect, to the contrary, the law presumes that the United States Coast Guard officials performed their official duty and that in

doing so they exercised at least ordinary care. Various Coast Guard inspectors participated in the annual inspections of the considerable number of Victory ships which had been bare-boat chartered by the government to appellant, owned by the appellant, and those which appellant was operating for the government under a general agency contract. The act of issuing a regular certificate of inspection for each such vessel constitutes an official and impartial opinion that each of said vessels fully complied with all of the requirements of the law, particularly in respect of safety to life. This official opinion is substantial *evidence*. The certificates of inspection are required by statute to "be verified by the oath of the Coast Guard official signing it". (46 U.S.C., § 399.) Therefore each such certificate is an *affidavit*. It is the *equivalent* of *personal appearance testimony under oath*.

Keeping in mind the contractual obligations and duty of the United States of America, the *owner* of the "Linfield Victory", as provided by Part II, Clause 1, Exhibit "B" and the duties imposed by the provisions of §§ 391 and 399, Title 46, U.S.C., upon the United States Coast Guard inspector who verified appellant's Exhibit "B", said certificate is *evidence under oath* that insofar as due diligence could make her so, the "Linfield Victory" was well and sufficiently tackled, appareled, furnished and equipped, in every respect seaworthy and in all respects fit for service in the operation of the appellant's intercoastal service. (Part I, Clause B; Part II, Clause 1, Bare-Boat Charter Agreement, Exhibit "B".)

The fact that the United States of America as the owner of the vessel retained full and complete control of the same with respect to structural changes or changes in the appurtenances when considered in connection with the proposition that the appellant was entitled to assume that

as far as due diligence could make her so the vessel was well and sufficiently tackled, appareled, furnished and equipped and in every respect seaworthy and in all respects fit for service, is of the utmost importance in determining whether any jury would be entitled to find, on the basis of the material, relevant and competent evidence in the record of the case at bar, that the appellant negligently failed to anticipate that an incident such as the precipitation of Hutchison to the bottom of the ventilator shaft in the port compartment of masthouse No. 2 was a reasonable possibility; against which the appellant was required to take some affirmative step in order to prevent the same. Appellant contends that there is absolutely no basis in the record upon which the jury could, as distinguished from whether it should, have made such finding.

There is no direct evidence showing or from which it can be reasonably inferred that Hutchison was precipitated or fell into the ventilator shaft on April 24, 1951. Appellee averred in the complaint that the exact date of the fall was April 24, 1951. There is no evidence to the effect that his body was dressed in the same clothing he had worn during the morning of that date. The ship was moored to a dock. It was the burden of appellee to show by *evidence* that the relationship of employer and employee was in full force and effect at the precise time of the fall and that Hutchison was also acting in the course of his employment. She was required to introduce affirmative evidence from which the jury could reasonably infer *when, how and why* Hutchison got into the ventilator shaft. She completely failed to do so.

The trial court *knew* that the jury could not say *when* the fall occurred and refused, for *that* reason, to submit an interrogatory requiring a definite answer as to the

date and time. (R.T. p. 808; T.R. p. 538.) The single fact that Hutchison's dead body was found in the bottom of the shaft on April 30, 1951 plus the testimony of Amundsen and Kalnin does not furnish a premise upon which to deduce reasonable inferences on the vital elements of when, how and why he happened to get there. The evidence introduced by appellee left these matters solvable, if at all, only by resort to *guesswork, surmise and conjecture.* That is not enough. There is no evidence showing that the degree of light was inadequate under *the conditions existing on April 24, 1951.*

Affirmative evidence offered by appellee supplies what amounts to conclusive proof that masthouse No. 2 and its appliances were and each thereof was at least reasonably safe. Kalnin testified that masthouse No. 2 and the access shaft containing the ladder were used constantly by seamen and longshoremen during the more than four months that he was a member of the crew. He had also been a crew member on several other Victory Ships.

With reference to the specific date upon which the appellee *claims* that Hutchison was in some manner precipitated to the bottom of the ventilator shaft, the testimony of Kalnin and Amundsen shows without conflict that Hutchison, Amundsen and other fellow crew members, without the slightest compulsion used the masthouse deck area, the appliances therein and the access shaft with the ladder without any difficulty, incident or accident. Amundsen *opened the masthouse door at 8:00 a.m.* It is a presumption that it remained open in the absence of *direct* evidence that it was thereafter closed. Amundsen and others went down at 8:00 o'clock, up at about 10:15 o'clock, down at about 10:30; up somewhere around 11:30 for lunch, down at 1:00 o'clock and up again at 3:00 p.m. when work was completed. Hutchison had used the ladder on at

least two occasions, once when he came up for coffee with the rest of the crew and next when he went down after coffee. If Amundsen's testimony is accepted at face value, Hutchison also used the ladder, without incident, at least a third time. Amundsen testified that he saw Hutchison go out the door at the lower deck level into the access shaft and "walk up the ladder". Amundsen did not say that he saw Hutchison *start* up the ladder. If Amundsen could see Hutchison enter the access shaft and walk up the ladder, it is *a reasonable certainty* that the *degree of visibility* at that point was *adequate.* He could not have seen Hutchison "walk up the ladder" without the presence of light, natural or artificial.

The sum and substance of the whole matter is that the seamen who were using the masthouse and the ladder on April 24, 1951, saw absolutely nothing connected with the masthouse, the appliances thereof, the access shaft, the ladder therein, or the degree of visibility, which indicated to any one of them that there was anything connected therewith which was in any sense not at least reasonably safe. None of these men, with actual knowledge of all of the existing conditions and circumstances, including the element of visibility or light, concluded that there was a possibility that Hutchison might have fallen into the ventilator shaft. They could see no reason why he might have done so. These practical on-the-spot reactions are of conclusive importance. The fact that all of them were able to and did use the ladder without incident or accident, in the manner in which and pursuing the purpose for which the masthouse and the ladder were supplied and furnished, demonstrates that the entire combination, under the conditions which existed on April 24, 1951, was at least reasonably safe.

Hutchison had *actual* notice of all of the existing physical facts, including the degree of visibility. This

appears as a matter of law. He had voluntarily used the facilities *at least* twice before he was injured. He, therefore, demonstrated *his* conclusion that there was no lack of reasonable safety in connection therewith.

Late in May, 1951, plaintiff's witness Castle boarded the ship and without artificial illumination of any kind or character went up and down the ladder several times. If he had had the slightest difficulty in doing this he would have said so. Also late in May, John Hutchison—not a seaman—went aboard the ship and was "in *all* parts of the particular section of the masthouse". This would include the access shaft and the ladder located therein. George E. Wise, not a seaman, boarded the vessel on May 10, 1952. He got from the masthouse deck level onto the ladder, partially descended it and thereafter climbed up and got back onto the masthouse deck level. If he, with a direct interest in the result of the trial, had had the *slightest* difficulty in doing this he would have said so.

The foregoing evidence, offered by appellee and by which she is bound, demonstrates that when used with even a *modicum* of care, the inside of the port compartment of masthouse No. 2 and everything leading therefrom to the lower deck levels by means of the ladder in the access shaft were and each thereof was reasonably safe and reasonably sufficient and provided, as a matter of law, a reasonably safe means of ingress and egress to and from the place of work. This is all that the law requires and no jury can be permitted to say otherwise.

Appellee claimed in the opening argument to the jury that Hutchison was precipitated into the ventilator shaft at approximately 11:00 a.m. on April 24, 1951. *When* the fallacy of this contention was pointed out in appellant's argument to the jury, appellee's attorney, in his closing argument, equivocated on this subject and stated appellee

was not contending that the accident happened at any particular time. Amundsen's testimony that he saw Hutchison "walk up the ladder" at sometime around 11:00 a. m. and that Hutchison did not come back into hold No. *2* thereafter, does not prove or tend to prove that Hutchison fell into the ventilator shaft at that time. If Amundsen actually saw Hutchison "walk up the ladder" he observed him walk all the way up the ladder. Kalnin's testimony is positive on the proposition that Hutchison came up from hold No. *3* at about ten minutes to twelve and that Hutchison used the access shaft ladder for his ascent on this occasion; and that he thereafter saw Hutchison either in or just leaving the messroom. He could not have been referring to *coffee* time because he mentioned a "*bowl of soup*". Kalnin's testimony is positive on the proposition that he was standing at the winches at the aft end of hatch No. 3 all during the time from 1:00 p.m. when the men resumed their work to and including 3:00 p.m. when all the work was finished and that Hutchison was not on deck at any time within that period. Therefore Hutchison could not have attempted to descend the ladder at any time between 1:00 p.m. and 3:00 p.m.

How, when and why Hutchison was precipitated to the bottom of the ventilator shaft is, so far as the evidence is concerned, a complete mystery. This mystery cannot be solved by a resort to speculation, surmise or conjecture. (*Union Oil Co. of Calif. v. Hunt*, 111 F.2d 269, 277-278.)

In the trial court, the appellee relied upon the utterly *isolated* statement of the Supreme Court in the case of *Lavender v. Kurn*, as follows:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-

> minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." (*Lavender v. Kurn,* 227 U.S. 645, 653, 90 L.Ed. 916, 923.)

Never at any time before or at any time since has the Supreme Court intimated that speculation (*intuition*) or conjecture may be used by a jury as the basis of a finding that a defendant is guilty of actionable negligence. It is obvious that where "there *is* an evidentiary basis for the jury's verdict, the jury is free to (*reasonably; not arbitrarily*) discard or disbelieve whatever facts are inconsistent with its conclusion". The deduction of the most reasonable inference from disputed facts or conflicts in the evidence is not "speculation and conjecture". Perhaps Mr. Justice Murphy was a student of semantics. (cf. Webster's New International Dictionary, Second Edition, Unabridged, page 2417.) He probably used the word "speculation" in the sense of definition number 3, as follows:

> "The faculty, act, process, or product of intellectual examination or search; a conclusion, opinion, or decision reached as a result of thought and reasoning; esp., reasoning taking the form of prolonged and systematic analysis; * * * ."

He obviously did not use the word within the meaning of definition number 4, as follows: "Loosely, *conjecture; guesswork;* surmise; as, his statement was mere *speculation.*" One of the definitions of the noun "conjecture", in the same dictionary, at page 564, is as follows: "Conclusion from appearances or indications; a ground for such conclusion." It is not conceivable that he used the word as authorizing a jury "to form an opinion or judgment upon what is recognized as insufficient evidence"

or "to arrive at by conjecture or to make conjectures as to; infer conjecturally, or by way of surmise; to form opinions concerning, on grounds confessedly insufficient to certain conclusions.—*v.i.* to make or form conjectures; esp., to draw conjectural inferences; to indulge in surmise."

Appellant contends that the true rule established by many decisions of the Supreme Court before and after the decision in *Lavender v. Kurn*, supra, is that no jury may predicate a verdict or a finding of fact upon speculation, surmise or conjecture.

Appellee's material, competent and relevant evidence is insufficient, as a matter of law, to support findings of fact in her favor with respect to the essential and genuine issues of material fact raised by the pleadings. Having failed to establish the negligent breach of any duty owed by the appellant to Hutchison or the essential element of proximate causal connection by substantial evidence, the case was insufficient to be submitted to the jury.

There is also an insufficiency of substantial evidence on the vital subject of damage. (*Union Oil Co. v. Hunt*, 111 F.2d 269, 277-278.) The evidence is insufficient, as a matter of law, to support the finding of the jury that appellee suffered pecuniary loss in the total sum of $50,000.00 as a proximate result of the death of her husband. The actual pecuniary damage, if any, suffered by appellee was necessarily future or prospective damage. It is elementary that future damage must be proved by a preponderance of substantial evidence to a reasonable certainty.

The right of action, *if any*, of the personal representative of the deceased, for the benefit of his surviving widow, arose immediately upon his death and the ap-

pellant then became responsible, *if at all,* in damages for the probable pecuniary loss suffered by the widow as the proximate result of the death.

> "But this pecuniary loss was to be determined by conditions existing *at the time of the death* of the deceased * * *".
>
> *Simoneau v. Pacific Elec. Ry. Co.,* 166 Cal. 264, 275-276, 136 Pac. 544.

It must be kept in mind that insofar as the question of inflation is concerned, that condition was in existence during the entire year 1950 and up to and including the date of Hutchison's death on April 24, 1951. The number of dollars which he earned were depreciated dollars, by reason of the economic situation existing in the United States during that period of time. The present worth or value of the future deprivation of support to the dependent wife of a seaman can not be predicated upon speculation, surmise or conjecture in respect of a mere possibility that there might be a future and additional depreciation in the value of United States money. The dollar *might* return to normalcy. This is likewise speculative and therefore unimportant. The only basis upon which to premise a *reasonable* sum as representing the present value of an actual loss of probable support includes the *certainty* of the continuation of *federal and state* income taxes. These elements must be considered in determining the "take-home" earnings. (*The City of Avalon,* 156 F.2d 500, 501.) No proof of the extent to which the state income tax for 1950 further diminished the gross earnings is in the record but it is an easy matter to calculate from the information in the federal return.

> "Although it thus appears that the damages sustained are largely of a prospective nature, the pe-

cuniary loss is to be determined by conditions existing at the time of the death, taking into consideration in measuring it the prospective benefits of which the (beneficiary was) deprived. * * * The jury in considering the probable future benefits which would have accrued must make its finding as to the present value of such benefits and not their future value."

8 *Cal. Jur.* pp. 1005-1006, § 52.

"Damages which are uncertain, contingent, or speculative in their nature can not be made the basis of a recovery. This rule is applicable in actions of contract, and subject to some differentiation as to the degree of certainty required, in actions of tort. It is distinct from the rule, discussed supra §§ 18-22, requiring the consequences to be the natural and proximate result of the wrong. From it results the rule, see infra § 28, that a plaintiff to support a recovery must not only show that he has sustained damage but must also show its extent with reasonable certainty.

* * *

"*Future consequences.* Compensation can not be based on a mere conjectural probability of future loss. So an award for future disability can not be based on mere conjectures and probabilities. Where a plaintiff claims compensation for future consequences of an injury ordinarily he must prove with reasonable certainty that such consequences will happen."

25 C.J.S., pp. 489-491, § 26.

The Supreme Court has established the precedent that the amount of damage which may be recovered by a widow pursuant to the provisions of the Federal Employers' Liability Act is confined to "compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings." (*Michigan Central R. Co. v. Vreeland,* 33 S.Ct. 192, 227

U.S. 59, 57 L.Ed. 417.) The jury is confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

In *Gulf, Colorado & Santa Fe Ry. Co. v. McGinnis,* 228 U.S. 173, 57 L.Ed. 785, the court held that the measure of damage was the pecuniary loss sustained by *dependent* surviving beneficiaries; and that the damage "is limited strictly to the financial loss thus sustained."

The only evidence in respect of the *extent* of pecuniary loss consists of the following: Kalnin testified that Hutchison would "make average wages about 270 something a month plus anywhere from $80 to $100 a month overtime, which was an average." (R.T. p. 169; T.R. p. 197.)

"He (Hutchison) shipped in New York as a.b., maintenance." (R.T. p. 115; T.R. p. 166.) (It will be agreed by the appellee that the date of Hutchison's employment in New York was April 17, 1951.)

Mrs. Hutchison's testimony is as follows: I and Mr. Hutchison filed a joint (income tax) return, respecting income for 1950. (R.T. p. 304; T.R. p. 261.) Whenever Mr. Hutchison came off of a trip he would "give me *around* seventy-five percent or *thereabouts* of his money. And he kept the rest, and *we* decided where *to put it* and *what to do with it.* * * * *We* disposed of it, however we did, *in the bank* or whatever *we* wanted to do with it. You know *like any other family* does." That was his consistent practice. (R.T. pp. 305-306; T.R. pp. 262-263.)

This money was community personal property and the husband retained absolute control over it. (Calif. Civil Code, §§ 164, 172.)

The joint income tax return for 1950 is appellee's Exhibit 17. This shows the total gross wages earned by Hutchison for the entire year as the sum of $4,705.96. The amount of income tax withheld at the source from Hutchison's gross earnings was the sum of $581.65. There-

fore, the net (take-home) earnings of Hutchison for the entire year 1950 was the sum of $4,124.31. Seventy-five percent x 4124.31 x 19 (the full life expectancy of Mrs. Hutchison) equals the total sum of $58,600.18. The "present value" of an annual annuity of $3,084.22 is considerably less than $50,000.00, the amount which the jury found was the total damage. *The record is absolutely silent on the vital subject of what proportion of the seventy-five percent was actually used or necessary for Mrs. Hutchison's support and maintenance.* Therefore, the amount of the verdict was based upon mere speculation, surmise and conjecture.

There is no evidence in the record showing that Hutchison earned any wages during 1951 excepting as a result of his employment aboard the steamship "Linfield Victory". This employment did not exceed one week in April, 1951.

The decision of the Supreme Court of the United States in the case of *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485, 60 L.Ed. 1117, demonstrates that the evidence in the case at bar is totally insufficient to sustain the finding of the jury that the total pecuniary loss *could* be the total sum of $50,000.00.

The jury specifically found that Hutchison was guilty of negligence which proximately contributed to his death. (R.T. p. 857; T.R. p. 574.) It also found that such negligence on the part of Hutchison proximately contributed *only to the extent of ten percent* of the total proximate cause of his death. (R.T. p. 857; T.R. p. 574.) The jury was required to use as a premise the inferred fact that he was in the full possession of his normal faculties; and, under the instructions given by the court, make a definite implied finding that Hutchison was guilty of some negligent act or omission which, in natural and continuous sequence, unbroken by any efficient intervening cause was

at least a substantial factor in producing the injuries resulting in his death and without which the death would not have occurred.

It is an absolute certainty, under the evidence in the record, that Hutchison was the *only* person who *could* have been guilty of any *affirmative* or *active* negligence proximately causing or proximately contributing to the personal injuries resulting in his death. There is no evidence of any slippery condition. The physical equipment and appliances in and about the ventilator shaft in masthouse No. 2 could not have pushed, thrown or caused Hutchison to slip into said ventilator shaft.

The absence of evidence showing that it was not reasonably possible for Hutchison to have observed all of these physical facts consisting of the inanimate objects such as the deck inside the port compartment of masthouse No. 2, the pipe railings surrounding the head of the ventilator shaft, and the access shaft containing the ladder, leads to the *inevitable* conclusion that his own affirmative negligent method of using these physical objects was the sole proximate cause of his injury and death. He had a free choice of routes, either one of which he could have used for the purpose of ascent or descent. The ladder at the aft end of hatch No. 3 was available all during the working hours, except during the *specific* times when a sling was either being raised from or lowered into the hold by means of the winch. It is obvious in view of the evidence that the men were sweeping and cleaning the holds, that there would not be constant ascent or descent of the full or empty dirt slings. There would necessarily be considerable intervals of time between each raising or lowering of a dirt sling during which any one of the men, including Hutchison, if he desired to do so, could have ascended to the deck from the hold or descended from the deck into the hold by means of the aft hatch

coaming ladder. If, *as appellee wants everybody concerned with this case to do,* we indulge in speculation, conjecture and surmise to the extent of "inferring" that the masthouse door was tightly closed, no light was coming in through the hollow ventilator tube, or from the lower hold into the access shaft; that Hutchison, fully cognizant of the fact that he was voluntarily and unnecessarily ascending into an area which was so dark that he could not see his hand in front of his face, nevertheless *continued to ignore the hazard* of such foolhardy conduct, it follows that we must also arrive at the *inevitable* conclusion that such negligent and reckless conduct on his part was the sole proximate cause of his injury and death. (*Bohannon v. U.S.,* 1950 A.M.C. 1008, 92 F.Supp. 700, 185 F.2d 678.)

If, which appellant seriously and strenuously disputes, there is *any* basis for the application of the doctrine of comparative negligence here, it seems obvious that the percentages should have been reversed by the jury. The finding of the jury that negligence on the part of Hutchison proximately contributed to his death *only to the extent of ten percent* of the total proximate cause is ridiculous. It is directly contrary to, and unsupported by, the evidence. (Of course, the clearly erroneous and "one sided" instructions and "comments" of the trial court had considerable influence in leading the jury astray.)

The evidence shows without conflict that Hutchison was 66 inches in height. The masthouse doorway was 54 inches high. If, instead of properly stepping over the coaming in an effort to enter the masthouse from the outside, Hutchison negligently stepped upon the upper edge of said coaming and remained erect he could very easily have caused a violent contact between some part of the top of his head and the upper part of the doorway. If this occurred he could have been stunned, lost his balance and sense of

equilibrium, come in violent contact with the upper pipe railing and have been catapulted to the bottom of the shaft. Self-preservation is one of the strongest instincts; and the natural reaction of a man, in the full possession of his faculties, in falling head-first, would be to stretch his hands out ahead of him to break the force of the fall. The only injuries referred to by Dr. Glauser in his deposition were confined to the head. He mentioned no injury whatever to the hands or arms; not even a bruise. It is, therefore, reasonable to infer that Hutchison was not in the full possession of normal faculties between the start of the fall and the time he landed on his head at the bottom of the ventilator shaft. Did he suffer a dizzy spell or "black-out" as a result of physical exhaustion stemming from his night out and the effort of an overweight man in climbing up the ladder from the lower hold?

Appellee's exhibit 15 (Log Entries), under date of April 30, 1951, shows that from 1700 until 1900 (5:00 p.m. to 7:00 p.m.) W. R. Sayer, Lt. Comdr., United States Coast Guard, Merchant Marine Investigating Unit, was aboard the vessel investigating the death of Hutchison. This activity was conducted pursuant to the statute which provides

> "for the investigation of marine casualties involving *loss of life* in order to determine whether any *incompetence, misconduct, unskillfulness* or willful violation of law *on the part of any* licensed officer, pilot, seaman, employee, *owner or agent* of such owner of any vessel involved in such casualty, or *any inspector, officer of the Coast Guard,* or other officer or employee of the United States, or *any other person,* caused, or contributed to the cause of such casualty. * * * The investigation shall determine, as far as possible, the *cause of any such casualty* or accident, *the persons responsible therefor,* and whether or not the United States Government employees charged with the *inspection* of the vessel or the vessels involved and with the examination of the licensing of the officers thereof

have properly performed their duties in connection with such inspection, examination *and licensing.''* (R.S. § 4450, 36 Stat. 1167, 49 Stat. 1381, 50 Stat. 554, 60 Stat. 1097, 46 U.S.C., § 239; cf. 46 U.S.C., § 636.)

Kalnin's testimony shows that a formal hearing was thereafter conducted by the Merchant Marine Investigating Unit of the United States Coast Guard, at Philadelphia, Pennsylvania, on May 1, 1954. It is a presumption of law, binding upon the Court and jury, in the absence of controverting affirmative evidence, that the Merchant Marine Investigating Unit of the United States Coast Guard performed its full official duty pursuant to the requirements of the statute. It is most significant that with full information with reference to the equipment and appliances in and about masthouse No. 2 aboard the steamship ''Linfield Victory'' and all of the circumstances which could be ascertained with respect to the cause of the death of Hutchison, the same agency of the government, the United States Coast Guard, reinspected and recertificated the same vessel in the identical condition in which it was on April 24, 1951. Thus, we have official findings of fact made by the United States Coast Guard Merchant Marine Investigating Unit, and the marine inspection unit, to the effect that the appliances in and about the ventilator shaft in masthouse No. 2 were in any event reasonably safe to life and had no causal connection with respect to the personal injuries which resulted in Hutchison's death.

A partial list of cases upon which appellant relies in support of its contentions under this subdivision is as follows: *Moore v. Chesapeake & Ohio R. Co.,* 340 U.S. 573, 95 L.Ed. 547; *Brady v. Southern Ry. Co.,* 320 U.S. 476, 88 L.Ed. 239; *Galloway v. U.S.* 319 U.S. 372, 87 L.Ed. 1458; *N.Y. Central R. Co. v. Ambrose,* 280 U.S. 486, 74

L.Ed. 562; *A. T. & S. F. Ry. Co. v. Toops,* 281 U.S. 351, 74 L.Ed. 896; *Northwestern Pacific Ry. Co. v. Bobo,* 290 U.S. 499, 78 L.Ed. 462; *Johnson v. Palmer, etc., R. Co.,* 120 F. Supp. 202, 220 F.2d 279, cert. den, 75 S.Ct. 883, 349 U.S. 954, 99 L.Ed. 1278; *Woods v. N.Y. Central R. Co.,* 222 F.2d 551; *Simpson v. Standard Oil Co.,* 223 F.2d 306; *Smith v. Arcadia Overseas Freighter,* 202 F.2d 141; *Repsholdt v. U.S.,* 205 F.2d 852; *Nagle v. Isbrandtsen Co.,* 177 F.2d 163; *Gibson v. International Freighting Corp.,* 173 F.2d 591; *Eckenrode v. Penn. R. Co.,* 164 F.2d 996; *Foster v. Moore-McCormack Lines, Inc.,* 131 F.2d 907; *Keiper v. Northwestern Pac. R.R. Co.,* 134 C.A.2d 702, 286 P.2d 47; petition of *personal representative* for a writ of certiorari, significantly *denied,* 100 L.Ed. 221; Wigmore on Evidence, 3rd Edition, Section 442; *Futterer v. Saratoga Ass'n. etc.,* 31 N.Y. Supp. 108.

(e) THE COURT ERRED IN GIVING INSTRUCTIONS; IN ITS INTERPOLATED COMMENTS IN RESPECT OF THE EVIDENCE AND, ALSO, EXTRANEOUS MATTERS; AND IN REFUSING TO GIVE INSTRUCTIONS REQUESTED BY APPELLANT; IN REFUSING TO SUBMIT SEPARATE FORMS OF VERDICT OR A SPECIAL INTERROGATORY WITH RESPECT TO THE AVERMENT OF PARAGRAPH IX OF THE COMPLAINT; AND IN REFUSING TO SUBMIT APPELLANT'S REQUESTED INTERROGATORY NUMBER 3.

The assigned errors involved here are: 20, 24, 25, 26, 27, 28, 29, 30, 33, 34 and 35.

By reference thereto appellant incorporates herein and adopts as part of its affirmative argument, each of the foregoing assignments of error; the first, second, third and fourth sections of its objections and exceptions to the instructions and comments of the trial court and to the refusal of the trial court to give appellant's requested instructions (Specification of Errors, supra); and the oral proceedings in respect of the subject matter of paragraph

IX of the complaint from and including page 588, line 7 to and including line 23, page 591, Reporter's Transcript of Proceedings; T.R. pp. 347-350.)

Appellant contends that instructions to a jury should be simple, concise, direct, distinct, accurate, impartial, and confined to the genuine issues of material fact raised by the pleadings; and that if a trial judge exercises the privilege of commenting upon the evidence, such comments must be clearly and distinctly *separated* from that part of the charge which purports to state the law applicable to the case; and above all should be fair and impartial as between the parties. (*Sacramento Suburban Fruit Lines Co. v. McKew,* 36 F.2d 917, 919; *Lynch v. Oregon Lumber Co.,* 108 F.2d 283, 287; *Sperber v. Connecticut Mut. Life Ins. Co.,* 140 F.2d 25; *Virginian Ry. Co. v. Armentrout,* 166 F.2d 400, 405; *McGlothan v. Pennsylvania R. Co.,* 170 F.2d 121, 124-125; and *Home Ins. Co. v. Consolidated Bus Lines,* 179 F.2d 768, 772-773.)

If this Court will read the oral arguments of the respective attorneys to the jury, in the light of the evidence in the record, and compare the arguments with the instructions given by the trial court to the jury, it cannot fail to observe that the trial judge in his instructions and comments to the jury practically cut from under the appellant any possible chance of obtaining a jury verdict in its favor and validified the contentions of appellee's attorney on practically every disputed point. For example, in the opening argument of appellee's attorney, he went to great lengths in an effort to convince the jury that the accident occurred at or about 11:00 a.m. on April 24, 1951. When that argument was disclosed to be fallacious in the argument of appellant's attorney, appellee's attorney in his closing argument took the position that it was immaterial when or at what time the accident happened. The trial judge, in his instructions, erroneously

and arbitrarily told the jury the same thing and went even beyond the contentions of appellee's attorney by stating that *neither* the *date* nor *time* of the accident was material! (Assigned errors, 33(j) and 33(k).)

The trial judge also, for all practical purposes, nullified the clearly legitimate argument of appellant's attorney to the jury in respect of the right, as a question of fact, of appellant, *up to the time of the accident,* at least, to act and rely upon the assumptions that the government as the owner of the vessel had exercised ordinary care in supplying whatever appliances were required in and about the ventilator shaft to provide a reasonably safe place in which to work; and that the various Coast Guard inspectors had exercised at least ordinary care and correct official judgment in determining that the masthouse and its appliances were reasonably safe. The appellant had *actual* notice that these inspections had been made and resulted in the official determination of the *safety* of at least forty-five Victory ships. This was of vital importance with respect to whether or not the appellant, in the exercise of reasonable care prior to the accident, was required to *anticipate* that any ordinarily careful and competent able-seaman, in the full possession of normal faculties of perception, might in some mysterious but possible manner fall to the bottom of the ventilator shaft.

Judge Tolin also nullified the argument based on the uncontradicted evidence that the United States Coast Guard, after having conducted investigations *required by statute* to ascertain the cause of Hutchison's fall to the bottom of the ventilator shaft and with full knowledge of the fact that he had suffered death as a result of such fall, *subsequently* inspected the "Linfield Victory" and again issued a regular certificate of inspection without requiring the slightest change or alteration of the part of the vessel involved in this case. The trial judge ignored or misread

the unambiguous language of §363, Title 46, U.S.C. which required the United States Coast Guard to *officially* ascertain whether *any* incompetence, *misconduct* or *unskillfulness* on the part of *any* person caused Hutchison's death; and to determine, as far as possible "the cause of any such casualty or accident" and "the persons responsible therefor." Thus, the purpose of the inquiries conducted by the United States Coast Guard at Philadelphia, on April 30 and May 1, 1951, was the same as the purpose of the inquiry during the trial of this action before the jury, to-wit: Was the death proximately caused by a negligent failure to supply sufficient appliances in and about the ventilator shaft in masthouse No. 2 of the "Linfield Victory" to provide a reasonably safe place in which to work? Judge Tolin was also apparently unaware of the *obvious* fact that the *sole purpose of the inquiries* made by the United States Coast Guard officers during their inspections of vessels, as a condition precedent to issuing an "under oath" certificate of inspection, is to determine whether the entire vessel, including all of its appurtenances and appliances, is at least reasonably safe. (Title 46, §§ 391, 399.)

The trial judge also nullified the argument of appellant's attorney in respect of the subject of negligence on the part of Hutchison by telling the jury that, in the opinion of the Court, the only possible basis of contributory negligence would be the *mere fact* that Hutchison, feeling "rugged" and with a "hangover", went about masthouses and climbed up and down ladders. He made no mention of the fact that the *manner* in which Hutchison went into or about the masthouse and the manner in which he may have gone up and down a ladder and the circumstances under which he did so were of vital importance in determining whether Hutchison was contributorily negligent, or was guilty of negligence which was the sole proximate cause of his death.

During the last session the trial court was presented with specific written questions prepared by the jury. He went way beyond the scope of the questions asked. The record shows affirmatively that the trial judge not only formed but expressed (in the absence of the jury) the opinion that plaintiff-appellee was entitled to recover a verdict. This Court will recall that during the statement of objections and exceptions to the charge the trial court said that he was of the opinion that Hutchison had a right to recover. This attitude on the part of the trial judge, in all probability, explains the one-sided nature of the instructions given and the comments with respect to matters entirely extraneous to questions of law which could have been applicable to the facts.

All of appellant's argument hereinabove with reference to the genuine issues of material fact raised by the pleadings and the subject matter of paragraph IX of the complaint is by reference thereto incorporated herein. (Argument, *supra,* (a), (a-1), (a-2) and (d).)

Immediately after appellant's attorney had completed his oral argument to the jury the trial court went into considerable detail in letting the jury know that no person could possibly know what might go on in the jury room. And that no one "can compel a juror to tell what went on in the jury room and *what the jury did and what the jury did not consider.*" (R.T. pp. 719-722; T.R. pp. 460-461.)

1. The matter set forth in assigned error 33(a) cannot be justified on the theory that it is either an instruction with reference to any matter of law involved in the case or the province or duty of a jury. It was, especially in the light of what the trial court had told the jury the day before, a clear invitation to the jury to be as arbitrary and capricious as it might choose to be. Appellant's requested instructions, assigned errors 34(a) and 34(b) are accurate and fair statements with respect to the province and duty

of a jury and should have been given in lieu of the language set forth in assigned error 33(a).

Appellant's requested instructions immediately hereinabove referred to were based upon California Jury Instructions, Civil, Nos. 1 and 6-A. Of course, the mere fact that suggested forms of instructions are set forth in California Jury Instructions, Civil, does not *ipso facto* establish their accuracy; but with respect to these two instructions there is no doubt that they are unimpeachable upon any possible ground. Therefore the trial court erred in giving the inaccurate instructions with respect to the duty and province of the jury and in failing to give appellant's requested instructions upon that subject.

2. In assigned error 33(a-1), the trial court initiated its erroneous expansion of the specific and sole issue of negligence. The only averment in the complaint on the subject of any breach of any duty proximately causing the injuries and death complained of is the averment in paragraph VIII: "That said injuries were directly caused by reason of the negligence of the defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work".

The record demonstrates that the trial court was determined to expand this sole and specific issue so that the jury could roam at will throughout the length and breadth of every possible factual basis of liability within the four corners of the Jones Act.

In assigned error 33(1) the trial court gave the jury a general definition of "negligence". This permitted the jury to decide against the appellant in the event it came to the conclusion that appellant did *any* act which a reasonably prudent person would not have done or failed to do *any* act which a reasonably prudent person would have

done. Every time the trial court used the word "negligence" in its instructions the jury was entitled to consider the same in the light of the general definition thereof which had been given to them. The issues were expanded, as far as it is possible to do so in the instructions referred to in assigned errors 33(h) and (i). No one can tell what the jury believed it could or could not do by the language "You are not to go beyond the *nature* of negligence which was charged" (Assigned error 30(w); or the language "the *type* of negligence that is alleged" (Assigned error 33(ee); or the language "the particular *kind* of negligence charged here" (Assigned error 33(ee)).

It is the contention of the appellant that the trial court should have told the jury distinctly, directly, concisely and without any equivocation or contradiction whatsoever that if the plaintiff had not proved by a preponderance of evidence that Hutchison died as a proximate result of a negligent failure on the part of the defendant to supply sufficient appliances in and about the ventilator shaft to provide a reasonably safe place in which to work, the verdict of the jury would have to be in favor of the defendant.

During the very last session, within an hour of the time the jury returned its verdict, the trial court stated to them as follows: "Now, when he died if he did not die *because* of *negligence* she has no claim. If he did not die *because* of the particular *kind* of *negligence* charged here she has no claim upon this defendant. But if he did die *because* of the particular negligence, which has been charged here, then her right accrued the moment he died." (R.T. p. 840; T.R. p. 560.)

The word "because" is not a definition of proximate cause. This language also revived, in the same paragraph, the general definition of "negligence"; and the instruction is therefore contradictory and conflicting within its own

language. There was no withdrawal of the instructions complained of in assigned errors 33(h) and 33(i). These conflicts and contradictions remained in the charge.

> "Where the trial court has given an erroneous instruction, it may be withdrawn so as to overcome error which otherwise might exist. But the withdrawal must leave no doubt in the minds of the jury as to what the court ultimately declares the law to be. To be effective, the correction must be clear and specific."
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> *Seaboard Air Line R. Co. v. Bailey,* 190 F.2d 812, 815-816.

The trial court, in the case at bar, did not at any time withdraw the instructions which erroneously expanded the sole and specific issue of alleged negligence on the part of the defendant.

Where the complaint alleges a specific negligent omission, the trial court must charge on said specific negligent omission and confine the issue to it. (*Atlantic Coast Line Co. v. Darden,* 216 F.2d 125, 128; *Consolidated Electric Co. v. Panhandle,* 189 F.2d 777; *Terminal R. Ass'n. v. Howell,* 165 F.2d 135; *Fleming v. Husted,* 164 F.2d 65; *Baer Bros. v. Palmer,* 158 F.2d 278; *Rashaw v. Central Vt. Co.,* 133 F.2d 253; *Illinois Central Co. v. Sitler,* 122 F.2d 279; *Schilling v. Del. & H. R. Corp.,* 114 F.2d 69; *Riley v. Sakow,* 110 F.2d 345; and *Carpenter v. Baltimore & Ohio R. Co.,* 109 F.2d 375.)

3. The instruction set forth in assigned error 33(c) is unquestionably erroneous and prejudicial. The jury had been told that its *duty* was to decide the questions of fact submitted to it. The first sentence of this instruction told the jury that "no expert and no certificate of inspection may suffice for your duty". "Suffice" is defined in standard dictionaries as follows: "To be enough; to meet or satisfy a need; to be adequate or sufficient". Appellant

does not contend that a certificate of inspection is conclusive. It is, however, quite clear that if the Court had correctly told the jury that the law presumes that United States Coast Guard officers who inspected the "Linfield Victory" and issued the certificate of inspection fully performed their official duties, and that such presumption was binding on the jury, in the absence of direct or indirect evidence to the contrary, then the certificate of inspection and what it stood for *could* have been enough to suffice for the performance of the jury's duty.

Appellant contends that no jury can approach its judgment or verdict *independently* of the testimony in respect of the experiences (observations) of any witness for either party or the experience of any other body or inquirer which has been the subject of testimony or evidence introduced. It is elementary that the verdict of a jury must be based upon the evidence in the case and can not be approached independently of such evidence. This particular instruction clearly invaded the province of the jury by instructing that the certificate of inspection and what it stood for was not sufficient to support a finding that the part of the vessel in question was reasonably safe. It also told the jury to disregard the experience of Captain Dyer who was the marine superintendent of appellant with reference to Victory ships, including his observation of the various inspections and to render a judgment and verdict independently of Captain Dyer's experience. Captain Dyer, as the agent of the appellant, was certainly justified in assuming that there was no insufficiency of appliances in and about the ventilator shaft when that particular part of each of these vessels had, on many occasions, been inspected and approved by qualified officers of the United States Coast Guard.

Related to the foregoing errors, appellant contends that they were compounded by the refusal of the Court to give

the instructions, or at least one of them, set forth in assigned errors 34(ww) and (yy). These instructions, requested by the appellant, would have clearly and correctly informed the jury of the law with reference to the evidentiary effect of the activities of the United States Coast Guard inspector and the certificates of inspection. They are based upon sections 363, 391 and 399, Title 46, U.S. Code; and are fully supported by the following authorities: *Armit v. Loveland,* 115 F.2d 308; *Sabine Towing Co. v. Brennan,* 72 F.2d 490; *Petition of Canadian Pacific Ry. Co.,* 278 F. 180; *O'Connor v. Armour Packing Co.,* 158 F. 241; and 32 C.J.S. page 502, § 640.

4. In spite of the fact that the part of the instruction referred to in assigned error 33(b) is set forth in B.A.J.I., this does not establish its accuracy. Appellant contends that while the burden of controverting the disputable presumption that Hutchison exercised ordinary care for his own safety and of proving his contributory negligence by a preponderance of evidence rested throughout the trial upon the appellant, nevertheless it was not required that appellant present any *affirmative* evidence with respect to those matters. The appellant was entitled to the benefit of all evidence offered by the appellee relevant to this subject. In any event, with respect to this particular element of burden of proof, appellant was entitled to its proposed instruction which is the subject of assigned error 34(ss). The authorities supporting appellant's contention in this respect are the following: 19 Cal. Jur. pp. 698-699 (cases cited in footnotes 13, 14, p. 699); *Blanton v. Curry,* 20 Cal.2d 793, 129 P.2d 1; *Soda v. Marriott,* 118 C.A. 635, 5 P.2d 675.

5. The instructions on the subjects of liability and contributory negligence are extremely one-sided. If the mere definition of "negligence" and "contributory negligence" (R.T. p. 776; T.R. p. 510; R.T. p. 778; T.R. p. 512) were

adequate with reference to the subject of contributory negligence, it is difficult to understand why the trial judge thought it was fair and impartial to point additional amplifications of the subject at the appellant, as follows: "A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required by that duty varies in direct proportion to the dangers known to be involved in the work. To put the matter another way, the amount of prudence required of an operator of a merchant vessel, in the exercise of ordinary care to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers that reasonably should be apprehended." (R.T. p. 773; T.R. pp. 507-508.) Nevertheless (Assigned error 34(qq)) the trial court refused to instruct the jury that "Hutchison was required at all times to exercise that amount of care and caution which would have been exercised under the same or similar circumstances by an ordinarily prudent person to observe and avoid danger." It is manifestly unfair to instruct a jury with particularity with respect to the duty imposed by law upon a defendant and refuse to instruct with respect to the duty imposed by law upon the person who has suffered an injury resulting in his death. The jury was not given *any* instruction upon the subject of the duty imposed by law upon him.

6. The instruction set forth in assigned error 33(e) should not have been given at all because Hutchison had actual notice of every condition in and about the area of masthouse No. 2 and all of said conditions were plainly obvious. Therefore he had no right to ignore the obvious physical facts or to assume that it was a reasonably safe place within which to work or to rely or act on that assumption if in fact it was not reasonably safe. This par-

ticular instruction is one which might be applicable *if* the question of *assumption of risk* were involved in the case. In any event if the trial court was justified in giving this particular instruction, the appellant was entitled to have its proposed instruction set forth in assigned error 34(qq) also given. (*Atlantic Coast Line R. Co. v. Dixon,* 189 F.2d 525; *Nagle v. Isbrandtsen Co.,* 177 F.2d 163; and *Thompson v. Camp,* 163 F.2d 396.)

7. This point involves assigned errors 33(e), (n), (q), (r), (cc), (dd), and (ff).

Evidently the trial court was of the erroneous opinion that by *reading* the averments of paragraph VIII of the first count and paragraph II of the second count, it was *stating the issues* raised by the pleadings. The trial court should not have told the jury that either the deceased or the appellee had a *cause of action* with respect to any matter or thing. The trial court should have confined its instructions to a statement of the genuine issues of material fact. One way to have done this would be to read the averments of the complaint and then plainly tell the jury which of said averments were admitted and which were denied. The trial court could very easily have stated that each averment of the complaint which was denied in the answer of the defendant raised a genuine issue of material fact and that the burden of proving each of such denied averments rested exclusively and continuously upon the appellee. What the trial court did was particularly harmful to the appellant. The jury could not have avoided understanding from what the trial court stated to them, as shown by the assignments of error involved here, that a cause of action is

> "a right of recovery; a right, which the law gives and will enforce, to recover something from another; the right to bring an action, suit, or judicial proceeding; the right to maintain an action upon the claim or matter included in it; the right to prosecute an action with effect." (1 C.J.S. p. 983, § 8(d).)

The trial court delivered a lethal blow to any possible chance of the jury rendering a verdict in favor of appellant when he stated to them as follows: "*Her cause of action* is *based* upon the *fact* that she has lost the support of that husband *due to the negligence of the defendant, meaning the particular kind of negligence which has been charged here.*" (Assigned error, 33(ff).) In this connection, appellant respectfully requests this Court to consider what it would do with a similar instruction in the event it had been given, and the jury had rendered a verdict in favor of appellant. The assumed instruction is as follows: One of the defenses interposed here is *based* upon the *fact that* Hutchison lost his life *due to negligence on his part,* meaning that *he negligently and carelessly failed to act as an ordinarily prudent person would have acted under the same or similar circumstances and that such negligence was the sole proximate cause of his death.*

8. This point involves assigned errors 33(f), (g), (h), and (r).

The trial court plainly told the jury that if a "seaman" can establish negligence of the owners of the vessel, or her officers, agents or employees, then he has a right of action for damages. (Assigned error 33(h).) He also told the jury that this action against the Pacific-Atlantic Steamship Company was predicated upon the Jones Act; and that in the mere event of injury Hutchison was entitled to this right; and that all of these statements were likewise applicable to appellee's claim for damages by reason of the death. The trial court also told the jury, and this was of the utmost prejudice to the appellant, that *if* the jury decided "the second cause of action", it was to "*decide* it *in her favor* for the damages which she has suffered."

The trial court on two separate occasions clearly and erroneously misdirected the jury with respect to the

claim for damages for death. He told them (assigned error 33(q) and assigned error 33(dd)) that paragraph II of the "second cause" constituted the charging part of the complaint and the "gist of the second cause of action." These instructions plainly told the jury that if Hutchison died as the result of his injuries and left the appellee surviving him as a dependent, then appellee was entitled to recover damages. Nothing could be more erroneous.

The trial court continuously and unnecessarily brought to the specific attention of the jury that the deceased was "a substantial contributor to her support"; and "she had been precipitated into the state of widowhood by that death"; and that the deceased was "the partial bread-winner of her family."

It is obvious that such continued suggestions by the trial court would have the effect of exciting the sympathy of the jury.

9. The jury came into court in an obviously confused state of mind at 10:23 p.m. on October 14, 1955, at which time the foreman presented to the trial court specific written questions. It was quite obvious that the jurors had not obtained a clear understanding of what the trial court was talking about in his previous instructions with reference to "the first cause of action" and "the second cause of action." They were also confused with reference to the extraneous issue involved in the "search for and discover" theory upon which they had been instructed. At that point, appellant contends that the trial court should have told the jury to disregard all of the instructions, with the exception of those which had been read from California Jury Instructions, Civil, and re-instructed the jury with respect to the law applicable to the genuine issues of fact raised by the pleadings. This should have included a clear and understandable state-

ment of the issues. Due to the lateness of the hour it would have been very proper to send the jury to a hotel and make a fresh start the next morning. Apparently on the theory that it was answering the question of the jury with respect to the "two causes of action", the trial court assumed, as an established fact, that "Mr. Hutchison was injured due to the negligent failure of the defendant to provide a reasonably safe place to work" and that there was a "failure to use reasonable care to maintain a reasonably safe place to work" and that "the 'Linfield Victory' did not use reasonable care to provide (the deceased) with a reasonably safe place within which to work."

No question was asked by the jury with reference to the subject of damages but the trial court went into that subject also. No mention was made of contributory negligence or negligence on the part of Hutchison which could have been the sole proximate cause of his injury and death. No question was asked by the jury with reference to how many suits for damages the appellee might maintain. The trial court erroneously and prejudicially stated to the jury as follows: "And there is only one law-suit in which she can collect, that is, she can't come back here next year and say, 'I want more.' * * * You just have to determine what the natural expectancies are and what sum of money can be awarded today on that second cause of action." A similar instruction was condemned as reversible error in the case of *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400, 406-407.

10. The errors involved here are those included within assignment 34.

Appellant is cognizant of the well established rule that no litigant is entitled, as a matter of right, to have a jury instructed in the precise language set forth in proposed instructions. On the other hand, every litigant is

entitled, as a matter of right, to have a jury accurately and fully instructed with respect to every proposition of law applicable to the genuine issues of material fact raised by the pleadings and evidence. If the trial court had charged the jury in accordance with the substance of the specific written requests of appellant, the jury would have been adequately, correctly and impartially instructed with reference to the issues pertaining to actionable negligence on the part of the appellant, contributory negligence on the part of Hutchison, negligence on his part as the sole proximate cause of his injury and death, the subject of disputable presumptions, and the vital element of foreseeability. None of these matters was adequately or correctly covered by the instructions actually given to the jury.

For example, the instruction that the amount of prudence required of an operator of a merchant vessel, in the exercise of ordinary care to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers that reasonably should be apprehended (R.T. p. 773; T.R. p. 508) does not cover the subject matter of foreseeability in a manner in which it can be understood by a jury of laymen. Appellant's proposed instructions on this subject are fully justified and supported by the following authorities: *Johnson v. Kosmos Portland Cement Co.,* 64 F.2d 193, 200; *Smith v. Lampe,* 64 F.2d 201, 202; *Sundberg v. Washington F. & O. Co.,* 138 F.2d 801, 803; and *Eckenrode v. Pennsylvania R. Co.,* 164 F.2d 996, 999.

There can be no doubt about the proposition that every litigant is entitled to specific instructions if the proposed instructions correctly state the law and are requested in writing. (*Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 433, 83 L.Ed. 265, 271; *Montgomery v. Virginia Stage Lines,* 191 F.2d 770; *Alaska Airlines v. Oszman,* 181 F.2d

353; *Southern Pacific Co. v. Sonza,* 179 F.2d 691; *Chicago, etc., Co. v. Green,* 164 F.2d 55; and *Madison v. White,* 52 F.2d 440.)

Appellant asserts and contends that each one of its proposed instructions which was refused by the trial court correctly and fairly states the law applicable to the genuine issues of material fact involved in the case and should have been given, either as requested or in language which would clearly cover the points of law involved. If the trial court had organized its instructions in accordance with custom and practice by reducing them to written form, instead of relying upon his memory, and giving many of them (as he stated) *out of his head and extemporaneously* (R.T. pp. 762-763; T.R. p. 499) much of the difficulty with respect to the subject of instructions would in all probability have been eliminated.

It is therefore respectfully submitted that the trial court committed prejudicial error in the instructions given to the jury, in the comments to the jury, and in the refusal to instruct in accordance with the written requests submitted by the appellant.

Appellant will now refer to certain of its proposed instructions which were refused by the court. Each number will be followed by authorities in support thereof. It was prejudicial error to refuse to give them.

Nos. 11, 11-A, 14, 14-A, 15, 15-A, 16, 16-A, 17, 31, 31-A, 32, 33 and 34, (45 U.S.C., §§ 51, 59; 46 U.S.C., § 688; *Atlantic Coast Line Ry. Co. v. Darden,* 216 F.2d 129; *Carstensen v. Hammond Lumber Co.,* 11 F.2d 142; *The Crickett,* 71 F.2d 61; *Shields v. United States,* 175 F.2d 743; *Larsson v. Coastwise Line,* 1950 A.M.C. 176, 181 F.2d 6; *Vileski v. Pacific-Atlantic S.S. Co.,* 163 F.2d 553); No. 24, (*California Code of Civil Procedure,* §§ 1961, 1963); No. 28, (*Cosmopolitan Shipping Co. v. McAllister,* 332 U.S. 783, 93 L.Ed. 1692; *Southern Shell*

Fish Co. v. Plaisance, 196 F.2d 312); Nos. 29, 30, 30-A, (*Adams v. American President Lines,* 23 Cal.2d 681, 146 P.2d 1); Nos. 32, 32-A, 35, 35-A, 36 and 36-A, (*Johnson v. Kosmos Portland Cement Co.,* 64 F.2d 193; *Smith v. Lampe,* 64 F.2d 201; *Sundberg v. Washington F. & O. Co.,* 138 F.2d 801; *Eckenrode v. Pennsylvania R. Co.,* 164 F.2d 996); Nos. 38, 39 and 49, (*Moore v. Chesapeake & O. R. Co.,* 340 U.S. 573, 95 L.Ed. 547; *Galloway v. U.S.,* 319 U.S. 372, 87 L.Ed. 1458; *Woods v. N.Y. Cent. R. Co.,* 222 F.2d 551); Nos. 40 and 40-A, (*Shields, Larsson, and Vileski, supra*); Nos. 41, 52 and 53, (*Looney v. Metropolitan R. Co.,* 200 U.S. 480, 50 L.Ed. 564; *Keiper v. Northwestern Pac. R.R.,* 134 C.A.2d 702, 286 P.2d 47); Nos. 42 and 43, (*Vileski, supra; Nagle v. Isbrandtsen Co.,* 177 F.2d 163; *Lake v. Standard Fruit etc., Co.,* 185 F.2d 354; *Atlantic Coast Line R. Co. v. Dixon,* 189 F. 2d 525); Nos. 44, 44-A, 45, and 45-A, (*Smith v. Acadia Overseas Freighter,* 202 F.2d 141); No. 47, (*Shields, Larsson, Nagle, Vileski, and Dixon, supra*); No. 54, (*Chicago, etc., Co. v. Bowers,* 241 U.S. 470, 60 L.Ed. 1107; *Atlantic Coast Line R. Co. v. Darden,* 216 F.2d 129; *Shields, Larsson, and Vileski, supra*); Nos. 55 and 55-A, (*Atl., etc., Co. v. Dixon,* 189 F.2d 525); Nos. 56, 57 and 57-A, (*Chrismer v. Bell Telephone Co.,* 194 Mo. 189, 92 S.W. 378); No. 66, (*Sacramento Suburban Fruit Lands Co. v. Boucher,* 36 F.2d 912).

(f) THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION, IN THE ALTERNATIVE, FOR A NEW TRIAL.

The assigned errors involved here are: 8, 18, 19 and 21.

By reference thereto appellant incorporates herein and adopts as part of its affirmative argument, each of the foregoing assignments of error; and also its argument under subheading (d), *supra,* with reference to the "in-

sufficiency of substantial evidence on the vital subject of damage."

It was the duty of the trial court to protect the appellant against the clearly unjustified findings that the total damage suffered by the appellee was the sum of $50,000.00 and that negligence on the part of the deceased contributed only to the extent of ten percent of the total proximate cause. Appellant is aware of the proposition that ordinarily a United States Court of Appeals does not interfere with the amount of a verdict once it has been approved by a trial court. Appellant respectfully contends that, under the circumstances of this case, it is entitled to the protection of this Court against the clear abuse of discretion on the part of the trial court.

V.

CONCLUSION.

Appellant respectfully contends that it is entitled to a reversal of the judgment with directions to the trial court to enter judgment in favor of the appellant notwithstanding the verdict. If this Court concludes that such action is not warranted, then the least that should be done is that the judgment be reversed.

Dated, San Francisco, California,
September 17, 1956.

Respectfully submitted,

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Attorney for Appellant.